TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. [redacted] 266

ANNA R. WATSON AND FREDERICK WATSON, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES W. WATSON, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

[redacted]

(27,[redacted])

(27,523)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 768.

ANNA H. WATSON AND FREDERICK WATSON, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES W. WATSON, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

INDEX.

	Original.	Print.
Papers on appeal to court of appeals	*a*	1
Statement under rule 41	1	1
Notice of appeal to appellate division	2	2
Order appealed from	4	2
Notice of appeal to surrogate	5	3
Order fixing tax	7	3
Notice of appeal	9	4
Order, August 3, 1918	10	5
Report of transfer tax appraiser	12	6
Supplemental report	20	11
Affidavit of Anna H. Watson and schedules	22	12
Affidavit of Anna H. Watson and schedules	37	23
List of investments	44	27
Affidavit of Eustace Conway	45	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1920.

	Original.	Print.
Affidavit of Frederick Watson	49	31
Will of Charles W. Watson	52	32
Stipulation as to form used for tax bill	57	35
Order fixing tax	60	37
Notice of appeal to surrogate	62	38
Notice of appeal to surrogate	64	39
Opinion by surrogate Cohalan	67	40
Stipulation waiving certification	73	43
Order filing case	74	44
Opinion of appellate division	75	44
Order of affirmance	84	48
Order resettling order of affirmance	85	49
Notice of appeal	88	50
Stipulation waiving certification	89	51
Remittitur from court of appeals	90	51
Order on remittitur	91	52
Order denying reargument	92	53
Order and notice of settlement	94	54
Order amending remittitur	96	55
Order and notice of entry	99	56
Order substituting attorneys	102	57
Assignment of errors	106	59
Petition for writ of error	109	60
Order allowing writ of error	112	61
Writ of error (copy)	114	62
Citation (copy)	117	63
Bond (copy)	119	64
Clerk's certificate	121	65
Opinion of court of appeals	122	66
Affidavit of Lee McCanless	135	77
Order allowing writ of error	136	77
Writ of error (original)	138	78
Citation (original)	141	79

a Court of Appeals, State of New York.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

PAPERS ON APPEAL FROM ORDER.

Lafayette B. Gleason, Attorney for State Comptroller, Appellant, 233 Broadway, New York City.
Eustace Conway, Attorney for Respondent, 66 Broadway, New York City.

1 Court of Appeals of the State of New York.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Statement under Rule 41.

This proceeding was begun by the petition and order appointing an appraiser filed in the office of the clerk of the Surrogate's Court of New York County and entered on or about the 14th day of September, 1917. The report of the appraiser was filed on or about the 4th day of April, 1918, and an order was entered thereon fixing tax on or about the 12th day of April, 1918. From this order an appeal was taken by the Comptroller of the State of New York and also by the executors of Charles W. Watson, the above named decedent, and on said appeal an order was made and entered in the office of the Surrogate's Court of New York County on the 3rd day of August, 1918, from which order the Comptroller has appealed to this Court.

That thereafter on or about the 3rd of August, 1918, an order was entered in the office of the Clerk of the Surrogate's Court
2 of New York County, and the report of the appraiser was remitted to him and he filed a second report on or about the 23rd day of August, 1918, on which an order was entered fixing tax on or about the 4th day of September, 1918, and filed in the office of the Clerk of the Surrogate's Court of New York County, from which order an appeal was taken to the Surrogate and on said appeal an order was entered in the office of the Clerk of the Surrogate's Court of New York County, on or about the 13th day of September, 1918, from which order the Comptroller has appealed to the appellate Division, First Department. The Appellate Division affirmed the order of the Surrogate by order dated January 10th, 1919; this order was resettled on January 21, 1919, so as to certify that a constitutional question was presented and from such order as restated the Comptroller appeals to this Court.

There has been no change of parties or attorneys pending this proceeding.

3 *Notice of A., al.*

Surrogate's Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

SIR:

Please take notice that the Comptroller of the State of New York hereby appeals to the Appellate Division of the Supreme Court for the First Judicial Department from the order of this Court dated the 13th day of September, 1918, and entered herein in the office of the Clerk of this Court on or about the 13th day of September, 1918, and from each and every part thereof, and that there will also be brought up for review the order made and entered herein in the Surrogate's Court of the County of New York, on or about the 12th day of April, 1918, and also the order entered in the office of the Clerk of the Surrogate's Court of the County of New York, on or about the 1st day of August, 1918.

Dated, New York, September 13th, 1918.

Yours, &c.,

LAFAYETTE B. GLEASON,
Attorney for State Comptroller, Appellant.

233 Broadway, Borough of Manhattan, New York City.

To Eustace Conway, Esq., Attorney for Executors, 66 Broadway, New York City.

4 *Order Appealed From.*

At a Term of the Surrogate's Court Held in and for the County of New York, in the Hall of Records, Borough of Manhattan, City of New York, on the 13th Day of September, 1918.

Present: John P. Cohalan, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

The Comptroller of the State of New York having appealed from the order fixing tax entered herein on the 4th day of September, 1918, entered on the report of the appraiser, filed on the 20th day of August, 1918, on the ground that it was error in failing to tax the transfer of certain securities.

Now, after hearing Lafayette B. Gleason, attorney for the State Comptroller, appellant, and Eustace Conway, attorney for the executors of the above-named decedent, and due deliberation having been had, it is

Ordered, that the appeal of the State Comptroller be and the same is hereby denied, and it is further

Ordered, that the report of the appraiser and order fixing tax herein entered on the 4th day of September, 1918, be and the same are in all respects affirmed.

JOHN P. COHALAN,
Surrogate.

5 *Notice of Appeal to Surrogate.*

Surrogate's Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

SIR:

Please Take Notice that the Comptroller of the State of New York is dissatisfied with the appraisal herein of the property of the above-named decedent as made and set forth in the report of the appraiser, filed herein on the 20th day of August, 1918, and with the order fixing and assessing the transfer tax in respect to the transfer of the property of said decedent, made and entered herein on or about the 4th day of September, 1918, and hereby appeals to the Surrogate from the said appraisal and from the said order assessing tax as aforesaid, on the ground that the same fails to include for taxation on the transfer of the investments and impose a tax on the transfer of the investments, mentioned in paragraphs 7, 8 and 9 of the appraiser's report, filed herein on or about the 4th day of April,
6 1918, when the transfer of the said investments *are* subject to tax under Sec 221-*b* of the law in relation to taxable transfers.

Yours, &c.,

LAFAYETTE B. GLEASON,
Attorney for State Comptroller, Appellant.

233 Broadway, Borough of Manhattan, New York City.

To Eustace Conway, Esq., 66 Broadway, New York City.

7 *Order Fixing Tax.*

At a Surrogate's Court Held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City of New York, on the 4th Day of September, 1918.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Upon reading the report of the appraiser, Joseph W. Spencer, Esq., duly filed herein on the 4th day of April, 1918, wherein it appears that said decedent died on the 18th day of August, 1917, and

upon reading the supplementary report of the appraiser, Joseph W. Spencer, Esq., duly filed herein on the 20th day of August, 1918, eliminating certain portions of the report pursuant to the order of the Surrogate, dated the 3d day of August, 1918, and upon motion of Eustace Conway attorney for the executors of the estate of Charles W. Watson,

It is Ordered and Adjudged,

That the cash value of the property referred to in said reports, the transfer of which is subject to *to* the law imposed by the act in relation to taxable transfers of property and the tax to which said transfers are liable is as follows:

8

Beneficiary.	Amount received.	Amount of exemption.	Taxable amount.	Tax assessed.
Frederick Watson, brother.	$30,000.00	0	$30,000.00	$650.00
Charles S. Hopkinson, nephew	1,000.00	0	1,000.00	50.00
Leslie W. Hopkinson, niece.	1,000.00	0	1,000.00	50.00
Frances H. Eliot, niece...	1,000.00	0	1,000.00	50.00
Christina H. Baker, niece.	1,000.00	0	1,000.00	50.00
Bess Watson, niece.....	1,000.00	0	1,000.00	50.00
Arthur H. Herschel, no relation	1,000.00	0	1,000.00	50.00
Winslow H. Herschel, no relation	1,000.00	0	1,000.00	50.00
Clementine H. Rawson, no relation	1,000.00	0	1,000.00	50.00
Elizabeth Watson, no relation	1,000.00	0	1,000.00	50.00
Josephine Jessup, no relation	1,000.00	0	1,000.00	50.00
Mary E. Hopkinson, sister.	4,863.00	0	4,863.00	97.26
Anna H. Watson, widow..	173,843.15	5,000.00	168,843.15	3,815.29
Executors for the benefit of persons of the 5% class for remainders after the life estate of Mary E. Hopkinson, sister, and Anna H. Watson, widow.	251,550.80	0	251,550.80	16,874.06

9

Notice of Appeal.

Surrogate's Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

SIRS:

Please Take Notice that the Comptroller of the State of New York hereby appeals to the Appellate Division of the Supreme Court for the First Judicial Department from the order of this Court dated the

1st day of August and entered herein in the office of the Clerk of this Court on the same day, and from each and every part thereof.

Dated, New York, August 27th, 1918.

Yours, &c.,

LAFAYETTE B. GLEASON,
Attorney for State Comptroller, Appellant.

233 Broadway, Borough of Manhattan, New York City.

To Eustace Conway, Esq., Attorney for Executors, 66 Broadway, New York City.

10 *Order.*

At a Surrogate's Court held in and for the County of New York at the Hall of Records, in the Borough of Manhattan, City of New York, on the 1st day of August, 1918.

Present—John P. Cohalan, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

An order or decree of this Court having been made and entered on the 12th day of April, 1918, confirming the appraisal filed in this Court on the 4th day of April, 1918, of the value of the inheritances and property of the decedent, the transfer of which is subject to the tax imposed by the Act in Relation to Taxable Transfers of Property, and assessing the tax to which said property and interests of the beneficiaries are liable under the said tax law of the State of New York; and the state Comptroller having on the 25th day of April, 1918, appealed from said report of the Appraiser herein filed the 4th day of April, 1918, particularly from the seventh and eighth clauses thereof, and from the order fixing and assessing the transfer tax in accordance with the seventh and eighth clauses of said report; and the Executors of Charles W. Watson, the decedent, having also and on the 24th day of May, 1918, appealed from said report
11 of the Appraiser herein filed the 4th day of April, 1918, particularly from the ninth clause thereof, and from the order fixing and assessing the transfer tax in accordance with the ninth clause of said report;

And said appeals coming on to be heard at the same time, Now, upon the facts appearing before me, and after hearing Lafayette B. Gleason, Esq., on behalf of the Comptroller of the State of New York, and Eustace Conway, Esq., attorney for the Executors,

It is Adjudged that the statute of the State of New York, Section 2 of Chapter 700 of the Laws of 1917, being statute entitled Section 221-*b*, "Additional Tax on Investments in certain cases", is in contravention of the Constitution of the State of New York, and void and of no effect.

It is further Ordered, Adjudged and Decreed that the property and interests of the beneficiaries under the will of said Charles W. Watson, deceased, are not subject to the operation of said Section 2 of Chapter 700 of the Laws of 1917, and the appeal of the Executors is sustained and the appeal of the Comptroller is denied.

It is further Ordered, Adjudged and Decreed that the report of the Appraiser, filed herein on the 4th day of April, 1918, be returned to Joseph W. Spencer, the Appraiser herein, for the purpose of eliminating the finding that the securities enumerated under paragraph Ninth of his report filed April 4th, 1918, are subject to the tax imposed by said Section 221-*b* of the Tax Law as added by Chapter 700 of the Laws of 1917.

JOHN P. COHALAN,
Surrogate.

Original filed Aug. 3, 1918.

A true copy:
DANIEL J. DOWDNEY,
Clerk of the Surrogate's Court.

12 *Report of Transfer Tax Appraiser.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, Under the Transfer Tax Law, of the Estate of Charles W. Watson, Deceased.

To the Surrogate's Court of the County of New York:

I, Joseph W. Spencer, Transfer Tax Appraiser, having been designated by Hon. Robert Ludlow Fowler, one of the Surrogates of the County of New York, by an omnibus order duly made and entered on the 14th day of September, 1917, to appraise the estate of the above-named decedent, pursuant to the provisions of the law relating to taxable transfers of property, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 230 of the General Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 27th day of November, 1917, at the office of the Transfer Tax Appraisers in and for the County of New York, in the Borough of Manhattan, City of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same, and having
13 given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First. I report that the decedent herein died a resident of the State of New York on the 18th day of August, 1917, leaving a last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the 6th day of Sep-

tember, 1917, and that thereafter on the 7th day of September, 1917, Letters Testamentary upon the estate of said decedent were duly issued by this Court to Anna H. Watson of 500 Madison Av-nue, Borough of Manhattan, City, County and State of New York, and Frederick Watson of Pittsfield, State of Massachusetts, as executors.

Second. I further report that the following appearances were noted by me at the appraisal herein:

Hon. Lafayette B. Gleason, Attorney for State Comptroller.

Eustace Conway, Esq., Attorney for Executors, 66 Broadway, New York.

Third. I further report that I found the property left by the decerent herein or in which said decedent had any beneficial interest to consist of the items set forth in Schedule A of the affidavit for appraisal of Anna H. Watson, hereunto annexed, and that the fair market value of each and every of the said items at the date of the decedent's d-ath is the amount set down by me opposite such
14 item in the column designated "Value as appraised in this proceeding" in said Schedule A.

And I further report that I have found the assets of this estate to comprise certain additional property not included in said Schedule A, and that the items thereof with their respective fair market values, at the date of the decedent's death, are set forth fully and in detail in the supplementary affidavit testimony of —— —— under date of —, hereto annexed, the total value of all of such additional property being the sum of $ (nothing).

Fourth. I further report that the sums properly to be allowed as deductions herein for funeral expenses, expenses of administration, debts of decedent, and so forth, are the amounts set down by me after the several items claimed in the column designated "Allowed in this Proceeding" in Schedule B of said petition.

Fifth. I further report that I find the state and condition of the estate of said decedent at its fair market value as of the date of decedent's death, the 18th day of August, 1917, and as appraised by me in this proceeding to be as shown in the following summary:

15

Real property in Schedule A1		$57,568.00
Personal property in " A2		3,640.39
" " in " A3		126,975.43
" " in " A4		304,620.03
Total assets (exclusive of property passing under a Power of Appointment)		$492,803.85
Subject to deductions as follows:		
Funeral expenses, B1	$561.10	
Administration expenses, B2	10,765.65	
Debts, B3	992.04	
Commissions	10,228.11	
Total deductions		$22,546.90
Leaving a net estate of which decedent died poss-ed, of		$470,256.95

to which is to be added the value of the property passing by virtue of the exercise of a power of appointment vested in said decedent, and set forth in Schedule C and therein appraised by me at the values written in after each item respectively in the column designated "Value as appraised in this Proceeding." — wit:

Making the total of all property passing upon the death of decedent of..... $470,256.95

Sixth. I further report all the beneficiaries entitled at the time of decendent's death to an interest in this estate pursuant to the provisions of law, and of the said decedent's last Will and Testament, the relationship of such persons to decedent, the amount of the share or interest of each, and whether such share or interest is taxable in this proceeding, to be as hereinafter set forth, all of said beneficiaries being of full age and sound mind except as otherwise designated.

16

Beneficiaries.		Amount of interest exempt.	Amount of interest taxable.
Frederick Watson, brother; Legacy	$30,000.00	0	$30,000.00
Charles S. Hopkinson, nephew; Legacy	1,000.00	0	1,000.00
Leslie W. Hopkins, niece, Legacy..	1,000.00	0	1,000.00
Frances H. Eliot, niece; Legacy...	1,000.00	0	1,000.00
Christina H. Baker, niece; Legacy.	1,000.00	0	1,000.00
Bess Watson, niece; Legacy.....	1,000.00	0	1,000.00
Arthur H. Herschel, no relation; Legacy	1,000.00	0	1,000.00
Winslow H. Herschel, no relation; Legacy	1,000.00	0	1,000.00
Clementine H. Rawson, no relation; Legacy.....	1,000.00	0	1,000.00
Elizabeth Watson, no relation; Legacy	1,000.00	0	1,000.00
Josephine Jessup, no relation; Legacy	1,000.00	0	1,000.00
Mary E. Hopkinson, sister; Life estate in $20,000.00. Present value.....	4,863.00	0	4,863.00

Remainder value is the sum of $15,137, as below:

Beneficiaries.		Amount of interest exempt.	Amount of interest taxable.
Executors for the benefit of persons of the five per cent class of taxation, above remainder of.....	$15,137.00	0	$15,137.00
Anna H. Watson, widow; Legacy..	50,000.00		
Specific legacy of clothing, furniture, watches and jewelry, appraised at.....	398.15		
Life estate in $259,858.80. Present value.....	123,445.00		
	173,843.15	$5,000	$168,843.15

Remainder value is the sum of $236,413.80 to Executors as follows:

Executors for the benefit of persons of the five per cent class of taxation, above remainder....	236,413.80	0	$236,413.80

Seventh. I further report that as to the following securities held by the decedent at the time of his death, no additional transfer tax is due thereon under Section 221-b of the tax law, since it appears that such securities are secured by deeds of trust or mortgage recorded in the State of New York within the meaning of Section 330 of the tax law. Such securities with their respective inventory values at the date of decedent's death are as follows:

	Securities.	Inventory value.
15	Third Avenue 1st 4% refunding bonds	$10,259.58
15	" " " " "	10,259.58
10	Bush Terminal Building 1st 5s	8,665.28
5	Lexington Ave. & Pavonia Ferry, 1st 5s	4,665.97
5	Lexington Ave. & Pavonia Ferry, 1st 5s	4,665.97
4	Bush Terminal 1st 4s	3,540.89
10	" " 1st 5s	8,665.28
5	New York Telephone 1st 4½s	4,766.88
5	Interborough Rapid Transit 1st 5s	4,657.64
11	Erie 1st 7s consol	11,962.19

Eighth. I further report that the decedent was duly assessed on his personal property as of October 1, 1914, by an assessment of $30,000 on the personal property tax rolls of the City of New York for taxes of 1915 and the tax thereon of $561 was duly paid by decedent, and by proof of such assessment and payment the personal representatives have proved that a personal property tax was assessed and paid on certain investments transferred by the death of this decedent, during the period they were held by the decedent, since it appears that they were acquired by decedent prior to the date of the said assessment, namely, October 1, 1914, and that, therefore, such investments are not subject to the additional transfer tax provided by Section 221-b of the tax law. The investments so exempted with the appraised inventory value thereof at the date of the decedent's death are as follows:

	Inv-stments.	Inventory value.
5	Chicago & Great Western 1st 4s	$3,317.78
10	" "	6,885.56
2	Houstin & East & West Texas 1st 5s	2,002.72
5	St. Louis & South West 1st 4s	2,534.44
5	" "	3,534.44
5	Missouri Pacific 1st 6s, consol	5,114.17
15	" "	15,342.50
12	Georgia Pacific 1st 6s	12,274.00
10	" "	10,228.33
6	Evansville & Terre Haute 1st 6s	5,867.00
9	Wheeling & Lake Erie 1st 5s	9,261.25
6	" "	6,174.17
6	Lake Erie & Western 2nd 5s	4,614.17
5	" " 1st 5s	5,007.64
5	Wheeling & Lake Erie, Wheeling Div., 1st 5s	4,832.64
15	Atlantic Gulf & West Indies S. S. Co.	12,472.92

Ninth. I further report that certain other investments transferred by the death of this decedent are subject to the additional transfer tax of five per centum on the appraised inventory value thereof at the date of decedent's death, as provided by Section 221-b of the tax law, since none of the grounds of exemption specified in said section appear with respect thereto, and in particular that no personal property tax was assessed and paid thereon by the decedent for the reason that the same were acquired by the decedent at various times subsequent to October 1, 1914, the date of his last assessment for personal property taxes. Such investments subject to the additional transfer tax are as follows:

	Investments.	Value.
15	St. Louis & San Francisco 1st P. L. 5s,	12,022.92
5	" " 1st. P. L. 4s,	3,101.11
7½	" " "	4,651.17
5	Evansville & Terre Haute 1st 6s,	4,889.16
5	Missouri Pacific 5s,	4,711.81
5	" "	4,711.81
1	St. Louis & San Francisco 1st 6ss	1,107.83
1	St. Louis & San Francisco 1st 6s,	1,107.83
5	Texas Pacific 1st 5s,	4,778.47
5	Dominion of Canada 5s,	4,857.69
5	Nipe Bay 1st 5s, 1925,	4,774.30
	Total	$59,284.58
		$2,964.29

Respectfully submitted,
JOSEPH W. SPENCER, *Appraiser.*

Dated: New York, N. Y., April 3rd, 1918.

Hearing, 300, Nov. 27/17.

20 *Supplemental Report.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Transfer Tax Law, of the Estate of Charles W. Watson, Deceased.

To the Surrogate's Court of the County of New York:

I, Joseph W. Spencer, to whom by an order of the Hon. John P. Cohalan, one of the Surrogates of the County of New York, dated the 3rd day of August, 1918, was remitted my report, heretofore filed herein on the 4th day of April, 1918, "for the purpose of eliminating the finding that the securities enumerated under Paragraph Ninth of his report filed April 4th, 1918, are subject to the tax imposed by said Section 221-b of the Tax Law as added by Chapter 700 of the Laws of 1917," as more fully set forth in the papers hereto attached and made a part of this supplemental report, do hereby make this as a supplemental and amended report:

1st. Having filed my oath of office, pursuant to Chapter 173 of the Laws of 1901, in the office of the State Comptroller, a hearing was had before me at the office of the Transfer Tax Appraisers in and for the County of New York, in the Borough of Man-
21 hattan, at which all persons known to have or claiming an interest in property of the above-named decedent were represented by Lafayette B. Gleason, Esq., Attorney for State Comptroller Eustace Conway, Esq., Attorney for Executors, 66 Broadway, Manhattan.

2nd. In accordance with the order of the Hon. John P. Cohalan, dated the 3rd day of August, 1918, I hereby report that I eliminated Paragraph Ninth of my former report heretofore filed herein, setting forth that the securities therein are subject to the tax imposed by Section 221-b of the Tax Law as added by Chapter 700 of the Laws of 1917; but in all other respects I hereby confirm my said former report entered in the Clerk's Office of the Surrogate's Court of the County of New York, on April 4, 1918.

Respectfully submitted,

——— ———,
Appraiser.

Dated, New York City, —, 1918.

22 *Affidavit of Anna H. Watson.*

Surrogate's Court, County of New York.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Anna H. Watson, one of the executors of the estate of the above-named decedent, being duly sworn in this proceeding for the determination of the tax, if any, to be paid upon the assets of the said estate under the Law in Relation to Taxable Transfers of Property, deposes and says:

I. That the said decedent died a resident of the County of New York, State of New York, on the 18th day of August, 1917, leaving a last Will and Testament, a copy of which is herewith submitted, which was duly admitted to probate by the Surrogate's Court of New York County, on the 6th day of September, 1917, and that Letters of Administration testamentary were duly issued by the said Surrogate's Court of New York County on the 7th day of September, 1917,
to this deponent, whose post office address is No. 500 Madison
23 Avenue, New York City, Manhattan Borough, and to Frederick Watson, whose post office address is Pittsfield, Massachusetts.

II. That as such executor deponent is personally familiar with the affairs of said estate, the property constituting the assets thereof and their fair market value, and with the debts, expenses and charges properly and legally allowable as deductions therefrom. That the decedent at the time of his death had no safe deposit box except one in the Safe Deposit Co. of New York, and one in the safe deposit vaults of the 5th Avenue Bank.

III. Schedule A1 sets forth each and every parcel of real estate in the State of New York of which decedent died seized and possessed, or in which he had any right, title or interest, and the liber and page of the record of the conveyance thereof; together with a statement of the mortgages and other encumbrances thereon at the date of death, giving the amount of such encumbrances and date, place, liber and page of record thereof. It also sets forth in the first marginal column the assessed valuation of said parcels and in second marginal column the estimated market value thereof (as appraised by a competent expert in real estate values, whose supplemental affidavit is herewith submitted).

Schedule A2 sets forth all of the moneys left by the decedent at the time of his death, whether in his immediate possession, standing to his credit or in which he had any right, title or interest, in banks or

deposit, savings banks, trust companies or other institutions, whether individually or in trust for or jointly with any other person, giving also separately the accrued interest thereon, if any, down to the last interest day prior to decedent's death in the case of savings accounts, and down to the date of decedent's death in all other cases.

Schedule A3 sets forth all wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses, carriages, automobiles, boats, and any and all other personal chattels of whatsoever kind or nature, left by the decedent, together with the fairly stimulated market value hereof (as appraised by a competent expert, whose supplementary affidavit is herewith submitted). It also contains a statement of all bonds and mortgages held by decedent and of all claims due and owing decedent at the time of his death, and of all the promissory notes or other instruments in writing for the payment of money of which he died possessed, of whatsoever nature, with interest thereon, if any (except such as are included in the statement of the decedent's interest in a co-partnership or business set forth in Schedule A5) giving face values and estimated fair market values thereof and if such estimated fair market values be less than the face value, setting forth in brief the reason for such depreciation as to each item. Said Schedule A3 also contains a statement of any and all moneys payable to the estate from life insurance policies carried by decedent.

Schedule A4 sets forth all the corporate stocks, bonds and accrued interest thereon to the date of decedent's death, or other investment securities owned by the decedent at the time of his death, with the market value thereof at such time, and in the case of unlisted corporate securities giving the State of incorporation of the corporation issuing the same, its capitalization, the value and nature of its assets, its liabilities, its surplus, the book value of its stock, the dividends paid, and any other facts which may be pertinent affecting the value of said securities, also the amount of any dividends declared on such stocks but unpaid at date of death.

Schedule A5 sets forth the interest of decedent at the time of his death in any co-partnership or business, a balance sheet of such business, and shows the nature and location thereof, the total capital employed, the gross profits, expenses and net profits of the business for at least three years prior to decedent's death, and any other facts pertaining to such business as may be pertinent to a fair and just appraisal of decedent's interest in said business and the good-will thereof. (Submitted to the Appraiser herewith is a certificate and two copies thereof showing the amount of the decedent's interest in such business and good-will thereof, made by a competent accountant).

Schedule A6 sets forth in itemized form, together with the fair market value thereof, any other property owned or left by decedent at the time of his death and not included in the preceding schedules.

IV. Schedule B1 sets forth the funeral expenses. Schedule B2 sets forth the expenses of administration and counsel fees paid or estimated. Schedule B3 sets forth the valid debts due and owing by

decedent at the time of his death and allowed as just and fair by the executor, together with a separate list of such claims as have been contested or rejected by him (except liens and incumbrances
26 upon real estate and except such as enter into the computation of decedent's interest in any co-partnership or business as sets forth in Schedule A5). Schedule B3 also sets forth all items claimed by the executor as proper deductions herein, and not included in the prior schedules.

V. Schedule C sets forth all the property, real and personal, which passed at decedent's death by virtue of the exercise by him of any power of appointment vested in him by the will, deed or other instrument of another, together with the fair market value of each item thereof and a statement in brief of the source and derivation of such power, copies of which will, deed or other instrument are submitter herewith. Said Schedule C also sets forth the interest of decedent in any estate of another; and any property wher-soever situated of which decedent made any grant, bargain, sale or gift in contemplation of death or intended to take effect in possession or enjoyment at or after the death of decedent.

VI. Schedule D contains a statement of the names of all persons beneficially interested in this estate at the time of decedent's death, the nature of their respective interests, their relationship, if any, to the decedent, together with the ages at the time of decedent's death of all minors, annuitants and beneficiaries for life under decedent's will, if any. It also contains a statement showing which of the beneficiaries named in decedent's will, if any, died prior to decedent, the dates of their deaths, their survivors, and the relationship of such survivor to decedent.

VII. That deponent has made due and diligent search for
27 property of every kind, nature and description left by the decedent, and has been able to discover only that set forth in Schedules A and C, and that no information or any other property of the decedent has come to *his* knowledge, and that *he* verily believes that decedent left no property except as therein set forth. That all the sums claimed as deductions in Schedules B are lawful, just and fair, that to the best of deponent's knowledge, information and belief the decedent made no gift, grant or conveyance of any property, real or personal, in contemplation of death; or to take effect at or after death, except as may be so specifically set forth in the appropriate schedule.

Deponent further says that wherever in any of said schedules the word "none" has been written or wherever such schedule has been left blank, such word or omission is to be taken as equivalent to an affirmative allegation by deponent that the decedent left no property of the kind to which schedule relates.

ANNA H. WATSON.

Sworn to before me this 14th day of November, 1917.

[SEAL.] SELAH L. BENNETT,
Notary Public, Westchester County.

Certificate filed in N. Y. County No. 262.
New York County Register No. 8243.
Commission Expires March 30th, 1918.

28

Schedule A1.

Real Property.

	Annual value for year of decedent's death.
Premises situate on the Southerly *site* of West 128th Street, in the Borough of Manhattan, New York City, beginning 300 feet west of Lenox Avenue and running west 150 feet, being half the block in depth; erected on which plot are ten (10) 3 story basement brown stone front private dwelling houses, commonly known as Nos. 126 to 144 West 128th Street.	
The conveyance to decedent of said premises are recorded in Section 7, Liber 177 conveyance, page 373 and Section 7, Liber 156 conveyance, page 391	$65,000.00
There should be deducted from the value of the said premises the value of the dower interest of Anna H. Watson, the widow of decedent, who was 67 years of age on December 12, 1916.	

Schedule A2.

Cash on Hand and on Deposit.

	Amount.
Cash on deposit in the Union Trust Company	$3,621.18
Interest on deposit to September 13, 1917	19.21
	$3,640.39

Schedule A3.

Personal Chattels—Bonds and Mortgages, Promissory Notes, Claims, Insurance, etc.

Household Furniture.

	Estimated market value.
1 small water color, marine, unsigned	$10.00
1 mahogany pedestal, marble top, old	2.00
1 small ebony table	2.00
1 mahogany frame round chair, green plush seat, worn	2.00
1 round mahogany centre table	6.00
1 old yellow plush couch	10.00
3 old pillows	1.50
1 small curio cabinet and curios	15.00
1 small cane settee	5.00
2 small water colors, marines, unsigned	10.00
2 small oil paintings, unsigned	10.00
29	
2 straight back chairs, old tapestry seats	6.00
1 old tapestry arm chair	3.50
1 mahogany frame chair, old, plush seat, worn	1.00

Library.

10 Vols. Macauley's Works, old	2.00
12 Vols. Gibbon's works, old	2.40
9 Vols. Boswell	1.50
25 old Vols. Dumas	5.00
8 Vols. Kipling	3.00
16 old Vols. Dickens	3.50
11 Vols. Thackeray	3.00
2 old open book shelves	5.00
250 miscellaneous old books	25.00
2 brass candle sticks	3.00
1 mahogany small workstand	3.00
1 engraving, Les Puiseuses Deau	10.00
4 Vols. Schiller	1.00
12 old Vols. Shakespeare	3.00

Dining Room.

1 square old fashioned dining room table	10.00
6 straight back chairs, old leather seats	9.00
1 arm chair, old leather seat	2.00
1 old shelf serving table	1.50
1 Sheraton Buffet	10.00
1 old brown plush sofa	6.00
2 china vases	1.00

Bed-room.

	Estimated market value.
1 old single brass bed	5.00
1 old box spring	1.50
1 hair mattress	5.00
2 pillows	1.00
1 round walnut table	1.00
1 old wicker arm chair slip seat	1.25
1 old rocker	.75
2 straight back mahogany frame chairs	1.50

Bed-room.

1 old single mahogany bed	6.00
1 box spring	2.00
1 hair mattress	5.00
30	
1 pillow	.50
1 old-fashioned mahogany dresser, marble top	3.50
1 old oak chiffonier	2.50
1 old wicker chair	.75
1 mahogany dressing table, chipped	8.00
..	

Bed-room.

1 mahogany roll top desk	10.00
1 mahogany chest of drawers	10.00
1 oak filing cabinet	2.50
1 old brass bed	5.00
1 box spring	2.00
1 hair mattress	5.00
1 pillow	.50
1 single mahogany sectional bookcase	10.00
100 miscellaneous old books	10.00
1 old chair, plush seat, worn	.50
1 oak night stand	.75

Kitchen.

Utensils and crockery	10.00

Jewelry.

1 open face Gold Watch, #115195, 18 kt.	25.00
1 jet and gold chain	8.00
2 small pearl shirt studs	50.00
1 small gold link chain	10.00
Lease of apartment in 500 Madison Avenue, expiring October, 1918	No value

Bonds & Mortgages.

	Estimated market value.
410 East 10th Street, Mortgage, $13,000, dated August 4, 1904, due August 4, 1907, from Nathan Feldman and Bessie Feldman, and Herman Weiss and Helene Weiss at 5%. Recorded August 4, 1904, in Section 2, Liber 176, page 365, Block No. 379, Assigned to Mr. Watson August 4, 1905. Extended to February 4, 1913. Present owner Jacob Moersfelder, 11 East 112th St. Principal due $12,000.00 at 5½%. Principal	12,000.00
Accrued Interest	25.60
520 West 49th Street. Mortgage dated April 25, 1907, from Isaac Levy and Frances Levy, 5½%, due December 1, 1908; recorded April 25, 1907, in Section 4, Liber 180, page 336, Block No. 1077; assigned to Mr. Watson April 25, 1907. Last extension to April 17, 1916, $15,000.00 at 5½%. Principal due $13,500.00. Principal	13,500.00
Accrued Interest	344.37
2130 Second Avenue, Carmela Leone, $12,000, dated December 27, 1905, due December 27, 1908. Recorded January 8, 1908, in Section 6, Liber 189, Page 100, Block No. 1681. Assigned to Mr. Watson March 16, 1912; Extension January 12, 1915, $11,000 to December 27, 1917, 5½%; July 1, 1915, $5,000 was paid, collateral bond of Louis Sherman and Harry Sherman, leaving mortgage due $11,000.00. Principal	11,000.00
Accrued Interest	225.18
124 Sixth Avenue, dated and recorded January 9, 1911, Liber 296, Section 2, Page 81, Block No. 573, 5%, dated January 10, 1911, $16,000; Wauhaupe Lynn and Henry W. Unger, January 9, 1914; Extended to January 9, 1916. Beneficiary Isabella Unger; 5½%; c/o Max D. Steuer, 115 Broadway. Mortgage due $16,000.00. Principal	16,000.00
Accrued Interest	95.39
41 and 43 West 135th Street, dated April 25, 1906. Joseph Wittner and Hulda Wittner, and Gottlieb M. Karpas and Ray Karpas, $35,000, June 30, 1911. Recorded April 26, 1906, in Section 6, Liber 196, Page 488, Block No. 1733. Assigned to Mr. Watson October 22, 1908. Extension February 1, 1914, 5½%. Principal	35,000.00
Accrued Interest	251.40

	Estimated market value.
61 and 63 West 135th Street. Rosalie Meyers. Dated December 27, 1906, $35,000, payable June 30, 1911. Recorded December 28, 1906, in Section 6, Liber 217, Page 344, Block No. 1733. Assigned January 3, 1907. Extension agreement of January 29, 1915. $30,000 due February 1, 1918. Subordinating agreement of the Union Exchange Bank. Principal	30,000.00
Accrued Interest	77.88
88 East 109th Street. Isaac Sakolski. Dated May 31, 1910. Park Avenue and East 109th Street. $9,000, payable June 1, 1913, at 5%. Recorded June 2, 1910, Section 6, Liber 264, Page 299, Block No. 1614; January 23, 1914, $1,000 paid and extended to January 1, 1917. 5½%. Balance due $8,000. Principal	8,000.00
Accrued Interest	57.46
Total	$126,975.43

32

Schedule A4.

Corporate Bonds and Stocks (Including Interest on Bonds to Date of Death and Stock Dividends Declared but Unpaid).

	Estimated market value.
15 Third Avenue 1st 4% refunding Bonds @ 68½. July coupon on	$10,275.00
5 Chicago & Great Western 1" Mortgage @ 67, at 4%	3,350.00
2 Houston & East & West Texas 1st 5% @ 99	1,980.00
5 St. Louis & South West 1st 4% 69½ @ 72	3,600.00
10 Bush Terminal Building 1" 5% @ 84¾	8,475.00
5 Lexington Avenue & Pavonia Ferry 1st 5% @ 91	4,550.00
9 Wheeling & Lake Erie 1st 5% @ 101	9,090.00
5 Missouri Pacific 1st 6% Consol. Gold Bonds, 100½ @ 102	5,100.00
12 Georgia Pacific 1st 6% 101½ @ 104	12,480.00
6 Evansville & Terre Haute 1st 6% 97 @ 100	6,000.00
5 Missouri Pacific 1st 5s, 1917, Convertible to 1923, @ 94	4,700.00
16 Virginia Debt Brown Bros. Ctfcts. ($39,235) @ 49	19,225.00
5 St. Louis & San Francisco 1st Prior Lien 4%, Series A, @ 61½	3,075.00
10 Chicago & Great Western 1st 4% 1959, M. & S., Sept. Cpn. on, @ 67	6,700.00
6 Lake Erie & Western 2d 5%, J. & J. 1941, July cpn., on, @ 82	4,920.00
1 St. Louis & San Francisco 1" 6% 1931, J. & J. July cpn. on, @ 106	1,060.00

		Estimated market value.
10	Bush Terminal Building 1" 5% 1960, O. & A., @ 84¾	8,475.00
6	Wheeling & Lake Erie 1" 5% 1926, A. & O., @ 101	6,060.00
5	Lexington Ave. & Pav. Ferry 1" 5% 1993, M. & S., Sept. cpn. on, @ 91	4,550.00
4	Bush Terminal 1" 4%, 1952, A. & O., @ 87	3,480.00
15	Missouri Pacific 1st 6%, 1920, M. & N. @ 102	15,300.00
5	New York Telephone 1" 4½%, 1939, M. & N. @ 95	4,750.00
10	International & Great Northern 1" 6%, 1919, M. & N., @ 98	9,800.00
5	Nipe Bay 1st 5%, 1925, M. & N. @ 94	4,700.00
10	Georgia Pacific 1" 6%, 1922, J. & J. @ 104	10,400.00
11	Erie 1st 7% consol. 1920, M. & S. Sept. 1917, cpn. on, @ 108	11,880.00
5	St. Louis & South West 1" 4%, 1989, M. & N. @ 72	3,600.00
5	Interborough Rapid Transit 1" 5%, 1966, W. & J., July '17 cpn. on, @ 94	4,700.00
15	Third Avenue 1st 4%, 1960, J. & J., July, 1917, cpn. on, @ 68½	10,275.00
5	Texas Pacific 1" 5%, 2000, J. & D. @ 96	4,800.00
5	Dominion Canada 5%, 1921, A. & O. @ 97	4,850.00
5	Wheeling & Lake Erie Wheeling div. 1" 5%, 1928, J. & J., @ 98	4,900.00
15	Atlantic Gulf & West Indies S. S. Co., 1" 5%, 1959, J. & J., July cpn. on, @ 83	12,450.00
5	Lake Erie & Western 1st 5%, 1937, J. & J., July, 1917, cpn. on, @ 97	4,850.00
5	Evansville & Terre Haute 1" 6%, 1921, J. & J. @ 100	5,000.00
15	St. Louis & San Francisco 1st prior lien 5%, Series B, J. & J. 1950, @ 79½	11,925.00
7½	St. Louis & San Francisco 1" prior lien 4%, Series A, @ 61½	4,612.00
33	5 Missouri Pacific 1st 5s 1917 Bds. convertible to 1926 @ 94	4,700.00
25	Virginia Defd. Brown Bros. Ctfcts. ($89,347) @ 49	43,780.00
	1,000 shares, par value $25, Tombstone Milling & Mining Co.	No value
12	Detroit Southern Ohio, 1st 4%, S. Division	No value
		$304,417.00

The above values include interest to date of decedent's death. See affidavit of Henry C. Lawrence hereto annexed.

Schedule A5.

Interest of Decedent in Any Co-partnership or Business, Together with Balance Sheet and Profit and Loss Statement.

None.

Schedule A6.

Property left by Decedent of Whatever Kind or Nature not Included in the Foregoing Sub-schedules.

None.

Schedule B1.

Funeral Expenses.

C. H. Jackson, undertaker	$535.10
Schubert Quartette, for services at funeral	25.00
Boston Evening Transcript, notice of death	1.00
	$561.10

Schedule B2.

Administration Expenses.

Expenses of Administration already paid.

	Claimed.
Rent of safe deposit vault in New York Safe Deposit Company	$25.00
Eustace Conway, legal fees and disbursements on probate of will	201.11
Eustace Conway, legal fees for services to estate	256.40
Frederick K. Watson, Executor's travelling expenses and petty cash disbursements to date	133.14
P. J. Curry & Co., appraisers, Transfer tax proceedings	100.00
Cyrus J. Lawrence & Sons, appraisers, Transfer tax proceedings	50.00
Future Expenses of Administration. (Estimated)	
Counsel fees	10,000.00
	$10,765.65

Commissions of two Executors each to receive full commissions.

34 *Schedule B3.*

Debts of Decedent. Also Deductions Claimed and not Included in the Preceding Sub-schedules.

	Claimed.
Knickerbocker Ice Company	$15.73
Bloomingdale Brothers	5.32
Sheffield Farms, Slawson Decker Co.	4.33
Sheffield Farms, Slawson Decker Co.	12.48
Barrett, Nephews & Co.	6.50
Darling & Company	8.57
J. Snedecor & Sons	14.41
Acker, Merrall & Condit Co.	59.60
Julius Dietz	34.18
St. Luke's Hospital	200.00
Harry Kingsbury, nurse	87.50
Sheffield Farms Milk Co.	18.51
Acker, Merrall & Condit Co.	63.58
Laura Currin, nurse at 500 Madison Ave.	30.00
Elma McDermott, nurse at 500 Madison Ave.	10.00
Maids in apartment to August 18	60.00
Walker Gordon Company, milk	1.20
Sundry petty cash owed by decedent, paid by Mrs. Watson, Ex.	27.41
Dr. A. T. Osgood, professional services	200.00
Madison Laundry	38.66
T. M. Stewart	9.12
F. M. Goodrich Auto Co.	21.00
Dr. F. E. Sondern	15.00
B. Altman & Co.	30.17
Park & Tilford	2.08
Charity Organization Laundry	7.13
Consolidated Gas Co.	7.76
	$992.04

Schedule C.

Property passing by decedent's exercise of any power of appointment: Interest of decedent in any other estate; Property transferred by decedent in contemplation of death or to take effect at death.

None.

35 *Schedule D.*

Beneficiaries and Their Interests, Relationship to Deceased, etc.

Mrs. Anna H. Watson, Widow,
67 years of age on December 12, 1916,
No. 500 Madison Avenue, New York City.

Mrs. Mary E. Hopkinson, Sister,
75 years of age on September 25, 1917,
Cambridge, Massachusetts.

Charles Sydney Hopkins, Nephew,
Manchester, Massachusetts.

Leslie Hopkinson, Niece,
Cambridge, Massachusetts.

Frances Hopkinson Eliot, Niece,
Cambridge, Massachusetts.

Christina Hopkinson Baker, Niece,
Cambridge, Massachusetts.

Frederick Watson, Brother,
114 Wendell Avenue, Pittsfield, Mass.

Bess Watson, Niece,
Pittsfield, Massachusetts.

Arthur H. Herschell, Nephew,
36 Washington, D. C.

Clementine H. Rawson, Niece,
Bayside, Long Island.

Elizabeth M. Watson, Cousin,
66 Morningside Avenue, New York City.

Josephine Jessup, No Relation.

None of the Beneficiaries named in decedent's will has died prior to the decedent.

37 *Affidavit of Anna H. Watson.*

Surrogates' Court, New York County.

Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

COUNTY OF NEW YORK, *ss.:*

Anna H. Watson, being duly sworn, says she is one of the executors of the Will of Charles W. Watson, deceased, and is his widow, and that a considerable part of the estate consists of bonds of Rail-

way and Industrial and other Companies, but that Mr. Watson, the decedent, did not have them stamped for the purpose of paying the State tax. A number of the bonds however are bonds falling within the exception provided in Section 330 of Article 15 of Chapter 700 of the Laws of 1917, being bonds of the State of New York, secured by deed of trust or mortgage on property situated wholly within the State of New York. A list of these bonds is annexed and made part of this affidavit, as Schedule A.

There are also some bonds, to wit, the Atlantic Gulf & West Indies Co., bonds, falling within the second exception of Section 330, of the Statute, being bonds or written or printed obligations held as collateral, to secure the payments of investments, and such
38 collateral itself being taxable under this article or under Article II of this Chapter. The bonds in question are listed also in Schedule A, together with a copy statement of the Trustee under the mortgage, The Equitable Trust Company of New York, covering the point.

The decedent also left certain bonds, of The Chicago & Great Western 1st 4%. The mortgage securing said bonds, provides that the coupons are payable without deduction of tax or taxes, which the Railroad Company or the Trustee may be required to pay or retain, under any present or future law of any State, County or municipality therein. The estate also received 15 St. Louis & San Francisco 1st Prior Lien Bonds, Series B, and 12½ 1st St. Louis & San Francisco Prior Lien 4% Series A. The mortgage securing these bonds provides that the Railway Company will pay the interest without deduction for any tax, assessment or Governmental charge which the Railway Company or the Trustees under the mortgage or deed of trust hereinafter mentioned may be required to pay or retain therefrom, under any present or future law of the United States of America or any State, County, municipality or taxing authority therein. These bonds are more fully described in Schedule B, herein annexed and made a part of this affidavit.

The remaining bonds, notes, debts, debentures, equipment bonds or notes, or written or printed obligations, forming part of a series of debts, debentures, similar bonds, notes or written or printed obligations, which by their terms are payable one year or more from their date of issue, and which are either secured by a mortgage pledge or deed of trust, of real or personal prop-
39 erty, or both, or which are not secured at all, are set forth in Schedule C, hereto annexed and made part of this affidavit, together with the number of such bonds, the appraised value as of date of decedent's death, and approximate date of purchase by the decedent in each case.

As to these, the executors desire to call the attention of the Commissioner to Section 221-*B* of the Statute which provides that such bonds shall be free from the penalty tax of the Statute, where a personal property tax was assessed and paid on such investments during the period in which they were held by the decedent.

Mr. Charles W. Watson has paid a personal property tax for approximately 25 years, with the exception of one year, when, by some chance, he was not assessed at all. Every other year he was

assessed at $30,000.00, and paid same without making any application for change. The executors respectfully submit that it is to be presumed that the decedent paid his personal property tax on all investments, less legal deductions as assessed by the City authorities, and that therefore the holding of bonds in question fall within the exception of Section *of* 221-*B*. The executors also desire to raise the question that in some cases, as deponent is informed and believes, for instance, Texas Pacific Railroad Bonds, the
40 Railroad pays the State Tax for bond holders; and that the Penalty Tax here in question is a State tax.

ANNA H. WATSON.

Sworn to before me this 28*th* day of December, 1917.
[SEAL.] JULIETTE SCHEINKMAN,
Notary Public.

N. Y. Co. Clerk's No. 403.
N. Y. Reg. No. 9430.
Kings Co. Clerk's No. 149.
Kings Co. Reg. No. 9224.
Expires March 30, 1919.

41

Schedule A.

List of Bonds Secured by Mortgage of Property in New York State, Not Including Accrued Interest.

15 Third Avenue 1st 4% refunding Bonds, July coupon on, @ 66..	$9,900.00
13 Third Avenue 1st 4%, 1960, J. & J., July cpn. on, @ 66.....	9,900.00
10 Bush Terminal Building 1" 5%, A. & O. @ 84.....	8,400.00
5 Lexington Ave. & Pavonia Ferry, 1st 5s, M. & S., @ 90.....	4,500.00
5 Lexington Ave. & Pav. Ferry 1" 5%, 1993, M. & S., Sept. cun. on, @ 90.....	4,500.00
4 Bush Terminal 1st 4s, 1952, A. & O. @ 86.....	3,440.00
10 Bush Terminal Building 1" 5%, 1960, O. & A., @ 84.....	8,400.00
5 New York Telephone 1" 4½%, 1939, M. & N., @ 94.....	4,700.00
5 Interborough Rapid Transit 1" 5%, 1966, J. & J., July '17, cpn. on, @ 91.....	4,550.00
11 Erie 1st 7s consol, 1920, M. & S., Sept. 1917, cpn. on, @ 106....	11,660.00
15 Atlantic Gulf & West Indies S. S. Co., 1st 5s, 1959, J. & J., July cpn. on, @ 80.....	12,000.00
	$81,950.00

Schedule B.

List of Bonds Providing for Payment of Taxes by Company.

Date of purchase.	Name.	
Mar. 26, 1912.	5 Chicago & Great Western 1st Mortgage 4s, M. & S., @ 65½.....	$3,275.00
Dec. 16, 1912-3. Nov. 11, 1913-5. Dec. 11, 1913-2.	10 Chicago & Great Western 1st 4s 1959, M. & S., Sept. cpn. on, @ 65½.....	6,550.00
Apr. 11, 1916.	15 St. Louis & San Francisco 1st Prior Lien 5%, Series B., J. & J., 1950, @ 79.....	11,850.00
Feby., 1917.	5 St. Louis & San Francisco 1st Prior Lien 4s, Series A, J. & J., @ 61¼.....	3,062.50
Jan., 1917.	7½ St. Louis & San Francisco 1st Prior Lien 4s, Series A, J. & J., @ 61¼.....	4,593.75
		$29,331.25

42 *Schedule C.*

List of Bonds Subject to Tax Unless Excepted.

Date of purchase.	Name.	
Jan. 22, 1908.	2 Houston & East & West Texas 1st 5s, M. & N., @ 97	$1,940.00
1901.	5 St. Louis & South West 1st 4s, M. & N., @ 71	3,550.00
"	5 St. Louis & South West 1st 4s, 1989, M. & N., @ 71	3,550.00
Jan. & Feb. 1913.	5 Missouri Pacific 1st 6s, Consol. Gold Bonds, M. & N., @ 101	5,050.00
Jan. & Feb., 1913- 5.	15 Missouri Pacific 1st 6s, 1920, M. & N.,	
May & July, 1914-10.	@ 101	15,150.00
1901.	12 Georgia Pacific 1st 6s, J. & J., @ 103	12,360.00
1901.	10 Georgia Pacific 1st 6s, 1922, J. & J., @ 103	10,300.00
Jan., 1902-5.	6 Evansville & Terre Haute 1st 6s, J. & J.,	
June, 1907-1.	@ 98	5,880.00
May, 1915.	5 Evansville & Terre Haute 1st 6s, 1921, J. & J., @ 98	4,900.00
August, 1916.	5 Missouri Pacific 1st 5s, 1917, Convertible to 1923, F. & A., @ 92	4,600.00
August, 1916.	5 Missouri Pacific 1st 5s, 1917, Bds. Convertible to 1926, A. & F., @ 91	4,550.00
1917.	1 St. Louis & San Francisco 1st 6s, 1931, J. & J., July cpn. on @ 105	1,050.00
Dec., 1915-8.	10 International & Great Northern 1st 6s,	
Feb., 1916-2.	M. & N., @ 96	9,600.00
Jan. 27, 1915.	5 Texas Pacific 1st 5s, 2,000, J. & D., @ 95.	4,750.00
Apr. 7, 1916.	5 Dominion of Canada 5s, 1921, A. & O., @ 96	4,800.00
Dec. 15, 1904-10.	9 Wheeling & Lake Erie 1st 5s, A. & O., @ 100	9,000.00
Jan. 22, 1908- 5.	6 Wheeling & Lake Erie 1st 5s, 1926, A. & O., @ 100	6,000.00
June 17, 1907-2.	6 Lake Erie & Western 2nd 5s, J. & J.,	
May 19, 1913-4.	1941, July cpn., on @ 79	4,740.00
" " "	5 Lake Erie & Western 1st 5s, 1937, J. & J., July 1917 cpn. on, @ 95	4,750.00
May 13, 1915.	5 Nipe Bay 1st 5s, 1925, M. & N., @ 92	4,600.00
1908.	5 Wheeling & Lake Erie, Wheeling Div., 1" 5%, 1928, J. & J., @ 96	4,800.00
		$125,920.00

43 Equitable Trust Company of New York.

Capital and Surplus $16,500,000.

New York Branches: 222 Broadway, 618 Fifth Avenue.

Foreign Branches: London, 95 Gresham Str., E. C.; Paris, 23 Rue de la Pai.

Trust Department.

New York, December 14, 1917.

Eustace Conway, Esq.,
66 Broadway,
New York, N. Y.

DEAR SIR:

Re Atlantic Gulf & West Indies Steamship Line Collateral Trust Company Mortgage Dated December 9, 1908.

As the name indicates, the above mentioned indenture is a mortgage on collateral, and so far as we know does not cover any real property and is not recorded.

Very truly yours,
(Signed) S. ARMSTRONG,
Assistant Secretary.

S. A./K. M. S.

44 Surrogates' Court, New York County.

In the Matter of the Appraisal Under the TRANSFER TAX LAW OF THE ESTATE OF CHARLES W. WATSON, Deceased.

List of investments of the estate of Charles W. Watson, deceased, received by the executors other than those secured by mortgages or deed and trust, recorded in the State of New York on property situated wholly within the State of New York, and other than any bonds, notes, debts, printed obligations, held as collateral to secure payment of debts taxable under this article.

Chicago & Great Western 1st 4s.
Houston & East & West Texas 1st 4s.
St. Louis & South Western 1st 4s.
Missouri Pacific 1st 6s.
Georgia Pacific 1st 6s.
Evansville & Terra Haute 1st 6s.
Missouri Pacific 1st 5s.
St. Louis & San Francisco 1st Prior Lien 4s.
St. Louis & San Francisco 1st 6s.
International & Great Northern 1st 6s.
Texas Pacific 1st 5s.
Dominion of Canada 5s.

Wheeling & Lake Erie 1st 5s.
Lake Erie & Western 2nd 5s.
Nipe Bay, 1st 5s.

45 *Affidavit of Eustace Conway.*

Surrogates' Court, New York County.

In the Matter of the Appraisal Under the TRANSFER TAX LAW OF THE ESTATE OF CHARLES W. WATSON, Deceased.

STATE OF NEW YORK,
County of New York, ss:

Eustace Conway, being duly sworn, deposes and says that he is the attorney for the executors herein.

The he has made an investigation with and through Mr. Frederick Watson and Mrs. Charles W. Watson, the executors, and on the account books kept by the decedent of the dates of purchase of the various securities held by him, the said Charles W. Watson, at the date of his death, and finds the same to be as follows:

46 Name.	When purchased.
Third Ave. 4% Refunding Bond	1912
Chicago Gt. Western 1st 4%	1912 and 1913
Houston East & West Texas 1st 5%	1908
St. Louis & South Western 1st 4%	1892
Bush Terminal Bldg. Co., 1st 5%	1913
Bush Terminal 1st 4%	1905
Lexington Ave. & Pavonia Ferry 1st 5%	1911
Wheeling & L. Erie 1st 5%	1907
Wheeling & L. Erie 1st 5% (Wheel. div.)	1912
Missouri Pac. 1st 6%	1913
Georgia Pac. 1st 6%	1891 and prior thereto
Evansville & Terre Haute 1st 6%	1896
Missouri Pac. 5%, 1917	Aug. 1916
" " 5% 1923 or 26	" "
41 Virginia deferred (W. Va.) Brown Bros. Certif. ($128,580)	Prior to 1891
12½ St. Louis & San F. (Series A) Prior Lien 4%	Jan. & Feb. 1917
15 St. Louis & San F. (Series B) Prior Lien 5%	May, 1917
Lake Erie & West. 2nd 5%	1911 and 1913
Lake Erie & West. 1st 5%	May, 1916
St. Louis & San F. 1st 6%	Apl. 1916
Interborough Rapid T. 1st 5%	1914
N. Y. Tel. 1st 4½%	1913
International & Gt. Northern 1st 6%	1915
Nipes Bay 1st 5%	1915
N. Y. Lake Erie & West. 1st 7%	1901
Texas & Pacific 1st 5%	1915
Dominion of Canada 5% 1921	Apl. 1916
Atlantic Gulf & West Indies S. S. Line 5%	1909

She has also made in the same manner an investigation of the balances of cash as of October 1st of each year for the last ten years preceding his death, and finds the same to be as follows:

Oct. 1, 1907	$6,689.22
1908	5,291.84
1909	11,183.15
1910	20,003.50
1911	3,913.63
47	
1912	3,591.03
1913	21,858.90
1914	7,019.71
1915	2,465.61
1916	10,354.70
	$92,371.29

Average balance on October 1, $9,237.12.

The decedent paid personal taxes in the City of New York, as appears by his vouchers and check book entries, for every year as assessed at $30,000, and without protest, for upwards of twenty years, except that for the year 1915 he does not seem to have been assessed, and deponent is unable to find any record of any tax assessed or paid.

Deponent annexes hereto one of said paid tax bills, and can produce and submit to the Commissioner all the other paid tax bills if required. They are all similar in form.

The executors also respectfully submit that their liability under the Federal Inheritance Tax Law is $14,262, and that this amount is a proper deduction to be made before the tax is assessed.

EUSTACE CONWAY.

Sworn to before me this 7th day of February, 1918.
[SEAL.] JULIETTE SCHEINKMAN,

Notary Public.

N. Y. Co. Clerk's No. 403.
N. Y. Reg. No. 9430.
Kings Co. Clerk's No. 149.
Kings Co. Reg. No. 9224.
Expires March 30th, 1919.

48 18-07 (B)

All bills paid in October must be rebated before drawing check for payment.

Checks received subject to collection.

Department of Finance, City of New York.

Borough of Manhattan.

Bureau for the Collection of Taxes.

Nos. 57 & 59 Chambers Street (Stewart Bldg.).

To the City of New York for Taxes, 1907.

Name, Chas. W. Watson.
Address, —— ——.
No money received after 2 o'clock.
All cash payments to be legal must be made to the Cashier at his window.
Money in envelopes will not be received.
Payment by check preferred.
Registered Nov. 20, 1907, Book F, Folio 43.
Rate, 1.48499 per centum.
Draw check to order of Receiver of Taxes.

Vol.	Line	To tax on personal estate	Valuation.	Tax
R. P.	31033	at No. 500 Madison Avenue.	Dols. 30,000	Dols. cts. 445 49

All checks given in payment of taxes must be certified.
Except when sent by mail.

Deduction.

A deduction at the rate of 6 per cent per annum calculated from the date of payment to the 1st day of December, will be made on all taxes paid previous to the 1st day of November.
Please reserve this bill.

Bureau for the Borough of Manhattan for the Collection of Taxes.

Paid by check.
No. 20, 1907.
1907.
E. F. McL., Cashier.
Received payment.

J. J. McDONOUGH,
Deputy Receiver of Taxes.

See back of bill for "Directions as to Payment" and penalties for nonpayment of taxes, etc.
Bills will be returned by mail only when the payment is accompanied by an addressed envelope with postage paid.

49 *Affidavit of Frederick Watson.*

Surrogates' Court, New York County.

In the Matter of the Appraisal, under the Transfer Tax Law, of the Estate of Charles W. Watson, Deceased.

State of New York,
County of New York, ss:

Frederick Watson, being duly sworn, says he is one of the executors of Charles W. Watson, deceased. That he annexes hereto a copy of the receipted bill for personal taxes of Charles W. Watson under the levy of 1915, the amount of which, $561.00, was paid by Mr. Watson on the 27th day of May, 1915.

The Comptroller appears to be correct in his criticism of our previous papers on this point, and the fact appears to be that Mr. Charles W. Watson was not taxed either under the levy of 1916 or of 1917; that is, two years instead of one, but careful investigation of all the books and papers has satisfied deponent that no assessment was made for those years on Mr. Charles W. Watson, and no application was made by him to have any assessment cancelled. Mr. Conway has made inquiry at the tax office and has been informed that no assessment was made by the city for those years.

50 The executors therefore ask leave to amend their previous affidavits accordingly.

The executors desire to point out that the great bulk of the securities held by the estate were purchased prior to January 1st, 1915, as shown by previous affidavits, and that the personal tax commissioners in New York presumably considered these in asses-ing Mr. Charles W. Watson.

FREDERICK WATSON.

Sworn to before me this 20th day of February, 1918.
[seal.] JOHN F. ALVINO,
Notary Public.

N. Y. Co. No. 145.
N. Y. Register's No. 9098.

51 15 (B) 35,000 sets.

The City of New York, Department of Finance.

Tax Levy of Borough of Manhattan, 1915.

Rate: 1.87 Per Centum.

Receipted Bill for Personal Taxes, Levy of 1915, in the Amount Stated Below, and as Recorded in the Tax Books as Indexed.

Volume.	Line No. changed each year.	Name.	Address.	Assessed valuation.	Amount of tax.
R P	13171	Charles W. Watson,	500 Mad. Ave.	30,000	561 00
Registered					

Book No. C — Folio 34

Interest to —
Marshal's Fees —
Costs —

Total Amount —
Paid

Paid 4. 527.15. Check. Stamp of Cashier.

Received payment 5/25 1915.

A. H. RUBECK,
For Deputy Receiver of Taxes.

If personal Taxes are not paid on or before the fifteenth day of January, the Receiver of Taxes may issue his warrant to the Marshal for their collection by distress and sale.

52 *Will.*

I, Charles White Watson, of the City, County & State of New York, aged seventy-five, married, and being of sound mind and memory, do make, publish, and declare, this my last will and testament,—

First, I order and direct that all my lawful debts and funeral expenses be paid and discharged as soon as possible after my decease.

Second, I give and bequeath to my beloved wife, Anna H. Watson the sum of Fifty Thousand Dollars, and direct that my Executors pay the same to her as soon as possible after my decease. If my wife prefers to take said bequest of fifty thousand dollars in securities rather than in money, as I would advise her to do, I desire that she shall have the opportunity to select from such securities as I may have on hand at the time of my decease such of them, at her option, as shall amount in value on the day of said selection to said sum of fifty thousand dollars; if such securities are listed on the New York Stock Exchange, the value of said securities is to be reckoned as of the last previous Stock Exchange sale of said securities in the City of New York. I will that my wife make this selection of securities, in lieu of cash, within four months of my decease, and that none of my securities be sold, or otherwise disposed of, until she

has had such opportunity. If my wife does not select such said securities within four months of my decease it shall be assumed that she prefers to be paid said fifty thousand dollars in cash.

Third, I give and bequeath to my beloved wife, Anna H.
53 Watson, all my clothing, furniture, watches, jewelry, and other property pertaining to daily and personal use.

Fourth, I give, devise, and bequeath to my Executors hereinafter named, the sum of Twenty Thousand Dollars in trust, to invest and keep the same invested, and to pay the net income thereof to my sister, Mrs. Mary E. Hopkinson of Cambridge, Massachusetts, during her natural life, and at the death of my sister, I give, devise, and bequeath said principal sum of twenty thousand dollars to her four children, namely, her son Charles Sydney Hopkinson, and her daughters Leslie Hopkinson, Francis Hopkinson Eliot, and Christina Hopkinson Baker, share and share alike. Should said Charles, Leslie, Frances or Christina die before their mother leaving children, I will in that case, that his or her share be divided, share and share alike, among the children that he or she may leave, and who are alive at the time of my sister's decease.

Fifth, I give, devise and bequeath to my brother, Frederick Watson, the sum of Thirty Thousand Dollars, and direct that my Executors pay the same to him as soon as pos-ible after my decease.

Sixth, I give, devise and bequeath to my nephew Charles S. Hopkinson, son of my sister Mary E. Hopkinson, the sum of One Thousand Dollars.

Seventh, I give, devise and bequeath to my niece, Leslie W. Hopkinson, daughter of my sister Mary E. Hopkinson, the sum of One Thousand Dollars.

Eighth, I give, devise and bequeath to my niece, Frances H. Eliot, wife of Samuel H. Eliot of Cambridge, Massachusetts, the
54 sum of One Thousand Dollars.

Ninth, I give, devise and bequeath to my niece Christina H. Baker, wife of George P. Baker, of Cambridge, Massachusetts, the sum of One Thousand Dollars.

Tenth, I give, devise and bequeath to my niece Bess Watson, daughter of my brother Frederick Watson, the sum of One Thousand Dollars.

Eleventh, I give, devise and bequeath to my wife's nephew, Arthur H. Herschel, the sum of One Thousand Dollars.

Twelfth, I give, devise and bequeath to my wife's nephew, Winslow H. Herschel, the sum of One Thousand Dollars.

Thirteenth, I give, devise and bequeath to my wife's niece, Clementine H. Rawson, wife of Hobart Rawson, the sum of One Thousand Dollars.

Fourteenth, I give, devise and bequeath to my cousin Elizabeth Watson, daughter of my father's brother, George Watson, the sum of One Thousand Dollars.

Fifteenth, I give, devise and bequeath to Josephine Jessup, daughter of Stephen Jessup, deceased, and at present residing in Rowyston, Connecticut, the — One Thousand Dollars ($1,000.00).

—th, All my property and estate not hereinbefore bequeathed or devised, I give, devise and bequeath to my Executors in trust to invest and keep the same invested and to pay the net income
55 thereof to my wife during her natural life.

Seventeenth, Upon the death of my wife, and the consequent termination of the trust as provided in the above Sixte-nth clause, I give, bequeath and devise the principal sum, the said property and estate before mentioned in said Sixteenth clause, to be divided as follows. Upon the termination of the trust, as provided in the above Sixteenth clause, I give and bequeath to my brother Frederick Watson the sum of Thirty Thousand Dollars, and to my niece Leslie W. Hopkinson, daughter of my sister Mary E. Hopkinson, of Cambridge, Massachusetts, the sum of Twenty-five Thousand Dollars; and I direct that the sum remaining after paying these said legacies to said Frederick Watson and Leslie W. Hopkinson be divided equally between my nephew Charles S. Hopkinson, my niece Frances Hopkinson Eliot, wife of Saml. H. Eliot of Cambridge, Massachusetts, and my niece Crhistina Hopkinson Baker, wife of George P. Baker of Cambridge, Massachusetts, share and share alike. Should either of the legatees under this Seventeenth clause die, leaving a child or children, his or her share is to go to said children. Should either of said legatees die leaving no child, then in that case his or her share is to be divided between the other legatees then surviving under this Seventeenth clause.

Eighteenth, I direct that all legacies given and devised by this, my will, shall be paid free from legacy duty or tax.

56 And, Nineteenth, and Finally, I hereby nominate, constitute and appoint my beloved wife, Anna H. Watson, and my brother, Frederick Watson, to be Executors of this my Will, and to be Trustees as provided in the Sixteenth Clause of said Will hereby giving and granting to them full power and authority to sell and convey any and all real estate of which I may die seized, or in which I may have an interest, hereby revoking all former wills by me made. And I direct that my said Executors be not required to give security, whether they shall be residents of this State or not.

In witness whereof I have hereunto set my hand and seal this 14th day of December, in the year One Thousand, Nine Hundred and Sixteen.

C. W. WATSON.

The foregoing instrument, consisting of two and one third pages, was at the day of the date thereof, signed, sealed, published, and declared by the said Testator Charles W. Watson as and for his Last Will and Testament in the presence of us, who at his request, and in his presence, and in the presence of each other, have, on this 14th day of December, 1916, signed our names as witnesses thereto.

HENRY L. HOBART,
120*Front Street, New York.*
MARGARET JEFFERYS HOBART,
Easthampton, Long Island, New York.

57 *Stipulation.*

Surrogates' Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

It is hereby Stipulated that the within is a copy of the form used for the tax bill sent decedent under which he paid the taxes of October 1st, 1914, and that the same may be made and be a part of the record with the same force and effect as if it had been submitted before the appraiser.

Dated, New York, June 8th, 1918.

LAFAYETTE B. GLEASON,
Attorney for State Comptroller.
EUSTACE CONWAY,
Attorney for Executors.

No. —.

Department of Taxes and Assessments.

Borough of Manhattan.

Hall of Records, Northwest Corner Chambers and Centre Streets.

The City of New York, October 1, 1913.

You are hereby notified that you- assessment for personal Estate for the year 1914 is $—.

58 If erroneous, this assessment can only be corrected on personal application to the Commissioners, at the Tax Office in your Borough, made on or before November 30, 1913.

Bring a memorandum of assets and liabilities, as the same were on October 1, 1913. Follow form on back of notice. Do not write on notice.

By order of the Commisisoners of Taxes and Assessments.

C. ROCKLAND TYING,
Secretary.

Department of Taxes and Assessments, City of New York, Borough of Manhattan.

Date, — ——, 1913. R. B. Line ——.

Corrected Assessment —, Subject to approval of Board as shown by As-essment Rolls.

——— ———,
Commissioner.

Tax Bills may be obtained at the office of

Receiver of Taxes,
57 Chambers Street,

on and after the first day of May, 1914, and not elsewhere. If the tax is not paid before June 1st, interest is added.

Commissioners' Examination.

Residence, —. Business, —.

Assets.

Goods, wares and merchandise exclusive of important goods in original packages unsold	$———	
Cash on hand and on deposit except in savings banks	———	
Notes and loans	———	
Bills receivable and open accounts	———	
	———	$———
	———	$———

59 Liabilities.

Amount owed on bond and mortgage	$———	
Amount owed on notes	———	
		$———
Amount owed on open accounts	———	
Exemption for woman or householder	———	$———
Add secured debts	———	$———

THE CITY OF NEW YORK,
County of New York, ss:

I swear that I am —— ——, the person to whom the within notice is addressed; that the above is a true and complete statement of — personal property on the first day of October, 1913; that there is not included in the amount stated as "owed" by — or held for — benefit, or for or on account of any liability as surety or indorser, or for the purpose of evading taxation.

——— ———.

Sworn to before me this — day of ——, 1913.

——— ———,
Commissioner of Taxes, the City of New York.

——— ———,
(Sign here.)

60 *Order Fixing Tax.*

At a Surrogate's Court Held in and for the County of New York at the Hall of Records, in the Borough of Manhattan, City of New York, on the 12th day of April, 1918.

Present, Hon. John P. Cohalan, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Upon reading the report of the appraiser, Joseph W. Spencer, Esq., duly filed herein on the 4th day of April, 1918, wherein it appears that said decedent died on the 18th day of August, 1917, and upon motion of Lafayette B. Gleason, attorney for the State Comptroller,

It is Ordered and Adjudged,

That the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act in relation to taxable transfers of property and the tax to which said transfers are liable is as follows:

61

Beneficiary.	Amount received.	Amount of exemption.	Taxable amount.	Tax assessed.
Frederick Watson, brother	$30,000.00	0	$30,000.00	$650.00
Charles S. Hopkinson, nephew	1,000.00	0	1,000.00	50.00
Leslie W. Hopkinson, niece.	1,000.00	0	1,000.00	50.00
Frances H. Eliot, niece...	1,000.00	0	1,000.00	50.00
Christian H. Baker, niece.	1,000.00	0	1,000.00	50.00
Bess Watson, niece.....	1,000.00	0	1,000.00	50.00
Arthur H. Herschel, no relation	1,000.00	0	1,000.00	50.00
Winslow H. Herschel, no relation	1,000.00	0	1,000.00	50.00
Clementine H. Rawson, no relation	1,000.00	0	1,000.00	50.00
Elizabeth Watson, no relation	1,000.00	0	1,000.00	50.00
Josephnie Jessup, no relation	1,000.00	0	1,000.00	50.00
Mary E. Hopkinson, sister.	4,863.00	0	4,863.00	97.26
Anna H. Watson, widow..	174,843.15	5,000.00	168,843.15	3,815.29
Frederick Watson, brother.	$30,000.00	0	$30,000.00	$650.00
Executors for the benefit of persons of the 5% class for remainders after the life estate of Mary E. Hopkinson, sister, and Anna H. Watson, widow.	251,550.80	0	251,550.80	16,874.06

Ordered and adjudged that the appraised inventory values of the investments referred to in paragraph 9th of the report, the transfers of which are subject to the tax imposed by Sec. 221-*b* of the Act in relation to taxable transfers of property are:

15 St. Louis & San Francisco, 1st P. L. 5s	$12,022.92
5 " " 1st P. L. 4s	3,101.11
7½ " "	4,651.17
5 Evansville & Terre Haute, 1st 6s	4,889.16
5 Missouri Pacific, 1st 5s	4,711.81
5 " "	4,711.81
1 St. Louis & San Francisco, 1st 6s	1,107.83
10 International & Great Northern, 1st 6s	9,678.33
5 Texas Pacific, 1st 5s	4,778.47
5 Dominion of Canada, 5s	4,857.63
5 Nipe Bay, 1st 5s, 1925	4,774.30
Total	$59,284.54

and the tax to which said transfers are liable under said Section is as follows:

	Appraised inventory value.	Tax assessed thereon.
Executor	$59,284.54	$2,964.23

JOHN P. COHALAN,
Surrogate.

62 *Notice of Appeal to Surrogate.*

Surrogates' Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

SIR:

Please Take Notice that the Comptroller of the State of New York is dissatisfied with the appraisal herein of the property of the above-named decedent as made and set forth in the report of the appraiser, filed herein on the 4th day of April, 1918, and with the order fixing and assessing the transfer tax in respect to the transfer of the property of said decedent, made and entered herein on or about the 13th day of April, 1918, and hereby appeals to the Surrogate from the said appraisal and from the said order assessing tax as aforesaid on the ground that the said report and order fail to impose a tax in respect to the securities mentioned in paragraph Seventh and
63 Eighth of the appraiser's report on which a tax under Section 221-*b* of the tax law should have imposed.

Dated, New York, April 25th, 1918.

Yours, &c.,

LAFAYETTE B. GLEASON,
Attorney for State Comptroller.

Office & Post Office Address, 233 Broadway, New York City.

To Daniel J. Dowdney, Esq., Clerk of Surrogates' Court.
Eustace Conway, Esq., 65 Broadway, New York City.

64 *Notice of Appeal to Surrogate.*

Surrogates' Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

SIR:

Please Take Notice that the Executors of the Estate of Charles W. Watson, deceased, being dissatisfied with the appraisal herein of the property of the above-named decedent, as made and set forth in the report of the Appraiser filed herein on the 4th of April, 1918, and with the order fixing and assessing the transfer tax in respect to the transfer of the property of said decedent, made and entered herein on the 12th day of April, 1918, hereby appeal to the Surrogate from the said appraisal and report, so far as it subjects this estate to an additional transfer tax under Section 221-*b* of the Tax Law and especially from the Ninth section of said Report; and from the said order assessing the said additional transfer tax, which order reads as follows:

"Ordered and Adjudged, that the appraised inventory values of the investments referred to in paragraph ninth of the report, the transfers of which are subject to the tax imposed by Sec.
65 221-B of the Act in relation to taxable transfers of property are:

15 St. Louis and San Francisco 1st P. L. 5s	$12,022.92
5 St. Louis and San Francisco 1st P. L. 4s	3,101.11
7½ St. Louis and San Francisco 1st P. L. 4s	4,651.17
5 Evansville & Terre Haute 1st 6s	4,899.16
5 Missouri Pacific 1st 5s	4,711.81
5 Missouri Pacific 1st 5s	4,711.81
1 St. Louis & San Francisco 1st 6s	1,167.83
10 International & Great Northern 1st 6s	9,678.33
5 Texas Pacific 1st 5s	4,778.47
5 Dominion of Canada 5s	4,857.63
5 Nipe Bay 1st 5s, 1925	4,774.30
	$59,284.54

and the tax to which said transfers are liable under said section is as follows:

	Appraised inventory value.	Tax assessed.
Executor	$59,284.54	$2,964.23"

And the Executors specify the grounds of their objection to said report, paragraph ninth thereof, and to so much of said order as is above recited to be that said Section 221-*b* of the Act in relation to taxable transfers of property, being Chapter 700, Section 2 of the

Laws of 1917, is unconstitutional and void, and that all proceedings taken thereunder and pursuant to the terms thereof are without validity or legal effect.

And the said Executors further specify the grounds of their
66 objections to the constitutionality of the said statute or Section 2 thereof to be that it is in violation of the Constitution of the State of New York, as unreasonable, oppressive and void, and especially,

1. That it is obnoxious to Article 1, Section 6 of the Constitution.

2. That it is obnoxious to Article III, Section 24 of the Constitution, and also Section 17.

Dated, New York, May 24th, 9918.

Yours, &c.,

EUSTACE CONWAY,
Attorney for Executors.

Office & Post Office Address, No. 66 Broadway, Manhattan Borough, New York City.

To Daniel J. Dowdney, Esq., Clerk of Surrogate's Court.
Lafayette B. Gleason, Esq., Attorney for State Comptroller.

67 *Opinion by Surrogate Cohalan.*

Estate of Charles W. Watson—The decedent died on the 18 h day of August, 18—, leaving a gross estate amounting to $492,803.85. Of this sum $232,593.72 consisted of investment securities. The decedent was assessed and paid taxes on his personal property in the sum of $30,000 for several years prior to October 1, 1914, but had not paid personal taxes from that time to the date of his death. None of these securities of which the testator died possessed was stamped pursuant to the provisions of the Tax Law. In his report the appraiser has classified the securities in the following manner. Under paragraph seventh he has listed the bonds secured by deeds of trust or mortgages recorded in the State of New York. He has reported as to this group that no tax is due, pursuant to the provisions of section 221-*b* as added by chapter 700 of the Laws of 1917. In paragraph eighth the appraiser has set forth investments acquired by the decedent prior to October 1, 1914, and reports that there is no tax due thereon under section 221-*b* because, during the period of their ownership by the decedent a personal property tax in the sum of $30,000 was paid. The remaining securities are listed under paragraph ninth of the report, and are those acquired by the decedent subsequent to October 1, 1914. Their value is fixed by the appraiser at the sum of $59,284.54, and he reports a tax due thereon pursuant to the provision of section 221-*b*. Appeals have been taken by the attorney for the state comptroller and the attorney for the estate from the report of the appraiser and the order fixing tax. The state comptroller appeals on the ground that the appraiser erred in not reporting

all the securities subject to the tax provided for by section
68 221-*b*. The executors appeal on the ground that section 221-*b* of the Tax Law is in contravention of section 6, article 1, section 24 of article 3 and section 17 of article 3 of the State Constitution. Section 6 of article 1 is the provision which protects against the taking of the property without due process of law. The other provisions of the constitution which the executors claim are violated by the statute in question need not be here discussed, because of the conclusions which I have reached. Chapter 700 of the Laws of 1917 is entitled "An Act to Amend the Tax Law, in relation to the tax on investments and transfers." By section 1 of the act, article 15 of chapter 62 of the Laws of 1909 is amended. Section 2 of chapter 700 of the Laws of 1917 is as follows: "Additional tax on investments in certain cases. Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-*a*, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt, and stamps affixed for a period including the date of the death of the decedent, or unless the personal representatives of decedent are able to prove that a personal property tax was asesessed and paid on such investment or secured debt during the period it was held by decedent, or unless the decedent was actually engaged in the bona fide purchase and sale of investments as a business, and at the time of his death had
69 maintained an office or place of business in this state for the carrying on of the actual bona fide business of purchasing and selling investments, as distinguished from the purchase thereof for investment purposes, and had owned and held such investment for sale for the purpose of his business and not as an investment for a period of not more than eight months prior to his death." Section 2 provides that section 2 of the act shall take effect July 1, 1917. The act became a law on June 1, 1917. The question of whether the owners of investments affected by the act were not given sufficient notice betwen the date of the passage of the act and the time when it became operative, so as to have their securities stamped or to pay their personal taxes, is, in my opinion, immaterial. It was within the undoubted pre-ogative of the Legislature to enact a law increasing the rates of tax on transfers which would take effect immediately on its passage, and if there were no other objection to its validity the fact that persons then living would not have an opportunity to adjust their efforts to meet the situation created by the new act could not be successfully urged against its constitutionality. It is in the provisions of the act itself that the vice lies. It has been held by the Supreme Court of the United States (United States v. Perkins, -63 United States, 625, 627, affirming In re Merriam, 141 N. Y., 479) and by our State Court (Matter of Swift, 137 N. Y., 77; Matter of Hoffman, 143 N. Y., 327; In re Vanderbilt, 172 N. Y., 69) that the

transfer tax is not a tax on property, but on the right of succession. Substituting this definition in interpreting section 221-*b*, that statute means that the right of an individual or corporation to succeed a decedent to the possession of unstamped securities shall be taxed at the rate of 5 per cent on their value, in addition to the tax already imposed by the other provisions of law relating to the tax on transfers. The transfer of the property takes place at the moment of death (Matter of Seaman, 147 N. Y., 69), and it is the right which accrues to the beneficiary at that time which is taxed by the Transfer Tax Act. The law here under consideration would vary the rate of tax imposed, depending upon whether the decedent in his lifetime, and prior to the accrual of the right of succession, had paid taxes on his personal property or had affixed stamps to the securities. Such a provision constitutes a discrimination and not a classification and is repugnant to the constitution in that it deprives of their property without due process of law those particular individuals who succeed to the possession of the property of the particular individuals who have not stamped their securities or paid a personal tax. In the case of Matter of Pell (171 N. Y., 48) Judge Bartlett, writing the opinion of the court, in which chapter 76 of the Laws of 1899 imposing a transfer tax upon remainders was declared unconstitutional, said, page 59: "Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification." The act here under discussion likewise fails to establish a general classification. It goes further than to discriminate against the recipients of a certain class of property and provides that transferees of the same class of property shall be taxed at different rates depending upon whether the transferor did
71 or did not stamp his securities or pay personal taxes. The act in question offends against the constitution in another particular. It provides that the transfer of investments or securities of the character described in the act as being liable for the tax, shall be free from the imposition thereof if the decedent was actually engaged in the purchase and sale of investments as a business. The provision just referred to was taken verbatim from section 336 of the Tax Law, which is entitled "No deduction of debts against taxable investments." The substance of the last named section is that the owner of unstamped investments shall be assessed on the fair market value thereof, without deduction for his debts, unless he shall be actually engaged in the purchase and sale of such investments as a business. While this provision is unobjectionable as a part of section 336 of the Tax Law, it cannot be defended as a provision for the imposition of a transfer tax. The law might with equal show of reason or validity provide that no tax should be assessed on the real estate of which a decedent died possessed if the said decedent happened to be in the real estate business. There is no support in law for an enactment which would give to the beneficiaries of the estate of a banker or broker immunity from the tax, while those who derive the same kind of property from individuals in other industries would be compelled to pay the additional impost. In Matter of Pell (supra)

Judge Bartlett, speaking of the decision of the United States Supreme Court in Cotting v. Kansas City Stock Yards Co. (183 United States 79), said (p. 58): "The case from which we have quoted above involved the validity of the Illinois trust statute of 1893, which
72 was alleged to be in violation of the Fourteenth Amendment of the Constitution of the United States. The act was held unconstitutional for the reason that the first section thereof embraced all persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturists or live stock dealers in respect of their products or stock on hand. This discrimination was held to render the statute invalid." The provision of section 221-*b* exempting from the operation of the tax the estates of individuals engaged in the brokerage business contravenes the constitution in precisely the same way. Even if it were not repugnant to the constitution, the provisions of the act would be found in their practical application to create such difficulties as to render the repeal of the act desirable. It would appear also that payment of the tax might in some cases be readily evaded. The tax is imposed on the transfer of the investments. If there is no transfer there can be no tax. There is nothing to prevent the executor or an administrator of an estate from satisfying the debts and administration expenses of the estate out of the securities liable to the additional tax and thus escape the impost. In fact, if an estate consisted entirely of securities subject to the tax, it would be necessary to exempt from the operation of the act such of the investments as were used to liquidate the debts and expenses of the estate. However desirable it may be that legislation be enacted which would serve to check the notorious evasion of the payment of personal taxes, I think
73 the result must be accomplished by some means other than that prescribed by the act now under consideration. As this court is one of first resort, the constitutionality of the act would ordinarily be presumed, but the statute so clearly offends against the provisions of the constitution that I am constrained to sustain the appeal of the executors on the ground that the act is unconstitutional and void. The report will therefore be returned to the appraiser for the purpose of eliminating the finding that the securities enumerated under paragraph ninth are subject to the tax imposed by section 221-b of the Tax Law as added by chapter 700 of the Laws of 1917. Settle order on notice.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the Court below acted, or their material portion thereof, in making the orders appealed from, and the whole thereof, now on file in the office of the Clerk of the Surrogates' Court of the County of New York.

Certification thereof in pursuance of Section 1353 of the Code of Civil Procedure is hereby waived.

Dated, New York, September —, 1918.

LAFAYETTE B. GLEASON,
Attorney for State Comptroller, Appellant.
EUSTACE CONWAY,
Attorney for Executors, Respondent.

74 *Order Filing Case.*

Pursuant to Section 1353 of the Code of Civil Procedure, it is hereby ordered that the foregoing case be filed in the office of the Clerk of the Appellate Division of the First Department.

Dated, September —, 1918.

——— ———,
Surrogate.

75 *Opinion.*

Supreme Court, Appellate Division, First Department.

Present:

Hon. John Proctor Clarke, P. J.
" Frank C. Laughlin.
" Walter Lloyd Smith.
" Clarence J. Shearn.
" Edgar S. K. Merrell, J. J.

No. 3243.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Appeal by the Comptroller of the State of New York from an Order of the Surrogates' Court in a Transfer Tax Matter, Wherein the Appraiser had Fixed a Tax Imposed by Section 221-*b* of the Tax Law.

Schuyler C. Carlton, of counsel (Lafayette B. Gleason, attorney), for Appellant.

Eustace Conway, for Executors, Respondents.

Malcolm S. McN. Watts, of counsel (Edward R. Greene with him on the brief; Stetson, Jennings & Russell, attorneys), for United States Trust Co. of New York, as Executors, parties similarly situated to Respondents.

76

Louis O. Van Doren, of counsel (Herrick McClenthen with him on the brief), for Title Guarantee and Trust Co., as Executor and Trustee, a party similarly situated to Respondents.

SHEARN, *J.*:

The section of the Tax Law in question is found in Chapter 700, Laws of 1917, "An Act to amend the Tax Law, in relation to the tax on investments and transfers." It is in form an amendment of Article 15 of the Tax Law, which provides for a tax on "investments" as therein defined. After amending so as to provide for a tax on twenty cents a year on each $1,000 instead of seventy-five cents for five years, and making various other amendments in eleven sections numbered 330 to 340, this section 221-*b* is inserted, reading as follows:

"Sec. 221-*b*. Additional Tax on Investments in Certain Cases. Upon every transfer of an investment, as defined in Article fifteen of this chapter, taxable under this articles, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one *a*, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt and stamps affixed for a
77 period including the date of the death of the decedent or unless the personal representatives of the decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; or unless the decedent was actually engaged in the bona fide purchase and sale of investments as a business; and at the time of his death had maintained an office or place of business in this State for the carrying on of the actual bona fide business of purchasing and selling investments, as distinguished from the purchase thereof for investment purposes, and had owned and held such investment for a period of not more than eight months prior to his death.

The Surrogate has held that the section offends the constitution in that it takes property without due process of law and denies the equal protection of the laws.

The obvious purpose of the statute was by the imposition of a heavy penalty, to enforce the payment of the tax on investments. However, commendable the object, it must be accomplished by laws that are equal in their application, if the additional impost be in the nature of a direct tax; and, if intended as a transfer tax, the classification which determines the exaction of the tax must have some direct relation to the right of inheritance. The State Comptroller practically concedes that this is a transfer tax but, while claiming it valid as such seeks also to sustain it as a direct tax. We think it *a* clear that this penalty was not intended to be imposed as a direct tax, but as a transfer tax. Assuming it to be
78 a direct tax, it is as such plainly unconstitutional. As a direct tax it imposed a penalty of five per cent for non-payment of the stamp tax. The omission, being the occasion for the penalty, should determine the application of the penalty. The de-

cedent may have omitted to stamp his securities in compliance with Article 15, or former Article 15 and the securities he owned may pass to a beneficiary, who by the operation of the usual exemptions, pays no transfer tax, and in this event, the omission of the decedent to duly comply with the law goes unpunished. On the other hand, the decedent's securities may descend to a beneficiary who has to pay a tax under the operation of the normal transfer tax law, and in that event the decedent's omission is punished by the infliction of the additional tax upon the beneficiary. It is not the existence of the omission which determines the application of the penalty but whether the transfer of the particular securities is or is not subject to the Transfer Tax Act. This is neither due process of law, nor does it afford all persons the equal protection of the laws. But it is not a direct tax; its place in the statute and the machinery of the law provided for its collection plainly show that the additional tax was intended to be levied and collected as a transfer tax and under the provisions of the Transfer Tax Law.

As a transfer tax, it is so arbitrary in respects having no relation to inheritance or to principles of inheritance taxation that it is unconstitutional. All laws of inheritance look with indifferent eye upon the kind of property transferred. This statute singles out a particular kind of property for a heavy additional charge, which is imposed according to the existence of circumstances which
79 have nothing to do with the process of inheritance. As illustrated by counsel, in the event that a decedent leaves by will a trust to pay the income for life to a son, the remainder to his children, and a similar provision is made for a daughter, and further, supposing that the fund set apart for the son is composed of cash or corporate stocks, while the daughter's fund is composed of untaxed bonds, if the factors of income and expectancy are equal, the State must tax the daughter's interest in the decedent's estate at six times the amount which the trust fund in favor of the son and his children is taxed. Again: Should a son inherit $5,000 from his parent under a specific legacy in a will consisting of named bonds on which no tax has been paid, either under Article 15 or former Article 15 of the Tax Law (which inheritance standing alone would be exempt), the additional tax of five per cent. on the assessed value of the bonds provided by Section 221-B would not be levied for the reason that there would not, under the terms of the Transfer Tax Law, be any transfer tax payable upon the inheritance. On the other hand, should a daughter under a specific legacy inherit an equal par value of designated bonds, likewise untaxed, but which bonds were worth more than par, so that a small tax was due upon her inheritance under the Transfer Tax Law, the five per cent. additional tax would be assessed against the daughter upon the value of the bonds at least to the extent of such excess. Thus this amendment separates out investment securities from all others, not because there is any difference in the process of
80 inheriting them, but merely to aid in enforcing an entirely different statute.

A penalty of five per cent. for the misdeeds or omissions of a decedent cannot be lawfully imposed upon the innocent beneficiaries

as a transfer tax. The transfer tax is a succession tax on the right of devolution of property of decedents. The fact of a transfer or succession is essential and fundamental. This is recognized in Matter of Wendell, 223 N. Y., 433, 441. A transfer tax must necessarily have a direct relation to the right of succession. A payment forced out of one party to pay for the debt or default of another has no relation to the right of succession which is the basis of the transfer tax. Non-payment of the stamp tax by the decedent does not effect the title to the securities upon which each beneficiary is taxed. This additional tax is not paid for the privilege of inheriting property of a decedent, but to punish the decedent for not paying a stamp tax to the State. The tax is not based on the value of the property, but is arrived at by arbitrarily increasing the rate on one class of property, and is or may be without relation to the value of the property received by a legatee as compared with the value of another's legacy. Not only does this statute thus depart from the established theory of an inheritance or succession tax, but it violates the established process of inheritance, with its preferences, which is the fundamental policy of the law in matters of inheritance, whereby the blood of the decedent has always been favored as to taxation and otherwise over collaterals and strangers, both in the process of inheritance and in the taxes levied upon it.

Another glaring instance of arbitrary classification found
81 in this act, having no relation to the right of succession, is its classification of taxpayers. It provides that the transfer of investments as securities of the character described in the act as being subject to taxation, shall be free from the imposition of the tax if the decedent was actually engaged in the bona fide purchase and sale of investments as a business. As it was pertinently said by the learned Surrogate: "The law might with equal show of reason or validity provide that no tax should be assessed on the real estate of which a decedent died possessed if the said decedent happened to be in the real estate business. There is no support in law for an enactment which would give to the beneficiaries of the estate of a banker or broker immunity from the tax, while those who derive the same kind of property from individuals in other industries would be compelled to pay the additional impost." Not only does this arbitrary classification have no relation to the right of succession but it is not even general and falls within the condemnation of Cotting vs. Kansas City Stock Yards Co. 183 U. S., 79.

The State Comptroller does not dispute that this tax is arbitrary and without relation to heritability of property but cites cases in which classifications contained in transfer tax laws have been arbitrary and yet the laws have been sustained. But in every such case, except Beers vs. Glynn, 211 U. S., 477, the classification bore a reasonable and just relation to the act in respect of which the classification was made, namely, succession of heritability. Such
82 classifications, based upon the amount that each inheritor receives, and upon the closeness of relationship to the decedent, are held not to be arbitrary but to bear a just and proper relation to the act in respect of which the classification is

made (Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 296; Campbell vs. California, 200 U. S., 87). In the case of Beers vs. Glynn, supra, cited by the appellant, the discrimination was in the machinery of the law assessing the tax and not any intentional exemption on the part of the legislature, or any attempt on its part to classify foreign estates.

The learned counsel for the appellant earnestly contends that the statute may be upheld on the principle that the legislature may provide that property shall not pass by inheritance until it has yielded its contribution to the State. There can be no doubt that the legislature has the right so to enact, provided the statute be of general application and free from arbitrary discrimination and inequalities. But this is not such a statute. Considering it to be the settled law that arbitrary classifications, which have no relation to the purpose of the act and rest on no substantial difference in fact, but which cause discrimination and inequality between persons situated in like circumstances, are unconstitutional, as denying the equal protection of the laws (Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S., 150), and finding that this act in its spirit, its terms and in its inevitable result, plainly violates the constitutional guarantees of due process of law and the equal protection of the laws, we have no recourse except to declare it invalid.

Several other grounds are urged for holding the amendment to be unconstitutional, and it is contended that it is utterly unworkable in its present form, but, in the view we take of it, it is unnecessary to consider these points.

In the brief submitted by permission of the Court on behalf of the Title Guarantee & Trust Company, as executor of a party situated similarly to the respondents, a vigorous attack is made upon the constitutionality of Article Fifteen of the Tax Law, but, as we do not regard the point as necessarily involved, we refrain from passing upon it.

The order appealed from should be affirmed with costs.

All concur.

Order of Affirmance on Appeal from Surrogate.

At a term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York, on the 10th day of January, 1919.

Present:

Hon. John Proctor Clarke, P. J.
" Frank C. Laughlin,
" Walter Lloyd Smith,
" Clarence J. Shearn,
" Edgar S. K. Merrell, J. J.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Order of Affirmance on Appeal from Surrogate.

An appeal having been taken to this Court from an order of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 13th day of September, 1918, bringing up for review the order entered on the 12th day of April, 1918, and also the order entered on the 1st day of August, 1918, by the Comptroller of the State of New York, and said appeal having been argued by
Mr. Schuyler C. Carlton, of counsel for the appellant, and by
85 Mr. Louis C. Van Doren, Mr. Malcolm S. McN. Watts and
Mr. Eustace Conway, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered and adjudged that the order so appealed from be and the same is hereby affirmed with costs.

Order on Motion for Resettlement.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York, on the 31st day of January, 1919.

Present:

Hon. John Proctor Clarke, P. J.
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
" Clarence J. Shearn, J. J.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Order of Affirmance on Appeal from Surrogate.

The Comptroller of the State of New York and the respondent having moved for a resettlement of the order made herein and
86 entered and filed in the office of the Clerk of this Court on the 10th day of January, 1919.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Schuyler C. Carlton, of Frederick Watson, and of Eustace Conway in support of said motion, and after hearing Mr. Schuyler C. Carlton and Eustace Conway for the motion.

It is ordered that said order be and the same hereby is resettled so as to read as follows:

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 10th day of January, 1919.

Present:

Hon. John Proctor Clarke, P. J.
" Frank C. Laughlin,
" Walter Lloyd Smith,
" Clarence J. Shearn,
" Edgar S. K. Merrell, J. J.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

Order on Motion for Resettlement.

87 An appeal having been taken to this Court from an order of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 13th day of September, 1918, bringing up for review the order entered on the 12th day of April, 1918, and also the order entered on the 1st day of August, 1918, by the Comptroller of the State of New York, and said appeal having been argued by Mr. Schuyler C. Carlton, of counsel for the appellant, and by Mr. Eustace Conway, of counsel for the respondent, and briefs having been submitted by Mr. Malcolm S. McN. Watts and Louis O. Van Doren, of counsel for parties similarly situated to respondent, and it appearing that the construction of the Constitution of the State of New York and of the United States is directly involved herein; and due deliberation having been had thereon, it is hereby unanimously ordered and adjudged that the order so appealed from be and the same is affirmed with costs.

Enter.

J. P. C.

88 *Notice of Appeal to Court of Appeals.*

Supreme Court, Appellate Division, First Department.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

SIR:

Please Take Notice that the Comptroller of the State of New York hereby appeals to the Court of Appeals from the order of the Appellate Division, First Department, made and filed in the office of the Clerk of said Appellate Division on the 10th day of January, 1919

as resettled by an order made and entered in said Clerk's office on the 31st day of January, 1919, and from each and every part thereof.

Dated, New York, February 3rd, 1919.

Yours, &c.,

LAFAYETTE B. GLEASON,
Attorney for State Comptroller, Appellant,

233 Broadway, Borough of Manhattan, New York City.

To Eustace Conway, Esq., 66 Broadway, New York City..

89 *Stipulation Waiving Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal to the Court of Appeals, the order granting leave to appeal to the Court of Appeals, the order of affirmance of the Appellate Division, the opinion of the Appellate Division, the notice of appeal to the Appellate Division and the order appealed from, and all the papers upon which the Court below acted, or the material portion thereof, in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the Surrogate's Court of the County of New York.

Certification thereof in pursuance of Section 1353 of the Code of Civil Procedure is hereby waived.

Dated, February 15, 1919.

LAFAYETTE B. GLEASON,
Attorney for State Comptroller, Appellant,
EUSTACE CONWAY,
Attorney for Executors, Respondent.

90 STATE OF NEW YORK:

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall in the City of Albany on the 20th day of May in the year of our Lord one thousand nine hundred and nineteen before the Judges of said Court.

Witness the Hon. Frank H. Hitchcock, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Remittitur, May 21st, 1919.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

Be it remembered that on the 18th day of February in the year of our Lord one thousand nine hundred and nineteen, Comptroller of the State of New York the appellant in this cause came hereinto the Court of Appeals by Lafayette B. Gleason his attorney and filed in

the said Court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And Anna H. Watson and ano. the respondents in said cause afterwards appeared in said Court of Appeals by Eustace Conway, their attorney.

Which said notice of appeal and return thereto filed as aforesaid are hereto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Alexander Otis of counsel for the appellant and by Mr. Eustace Conway of counsel for the respondents, by Malcolm S. McN. Watts of counsel for intervenors.

And after due deliberation had thereon, did order and adjudge that the order herein be and the same hereby are reversed with costs in all courts and proceeding remitted to Surrogate's Court for assessment of tax in accordance with opinion.

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the Surrogate's Court of New York County there to be proceeded upon according to law.

Therefore it is considered that the said orders be reversed, with costs in all Courts and proceeding &c. as aforesaid.

And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises are by the said Court of Appeals remitted unto the Surrogate's Court of New York County before the Surrogate thereof according to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said Surrogate's Court before the Surrogate thereof &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

Albany, May 21, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached hereto.

[SEAL.] R. M. BARBER,
Clerk.

91 At a Surrogate's Court held in and for the the County of New York in the Hall of Records, Borough of Manhattan City of New York, on the 29th day of May, 1919.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

An appeal having been taken by the State Comptroller to the Court of Appeals from an order of the Appellate Division of the Su-

preme Court in and for the First Judicial Department, confirming an order of the Surrogates' Court of New York County made and entered in the office of the Clerk of this Court on the 13th day of September, 1918, and upon said appeal the said order of the Appellate Division of the Supreme Court and this Surrogates' Court having been reversed.

And the remittitur from said Court of Appeals, together with a certified copy of the order of said Court of Appeals having been duly filed in the office of the Surrogate of New York County on the 24th day of May, 1919, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court; and it is further

Ordered that the order of the Appellate Division of the Supreme Court appealed from herein and the order of this Surrogates' Court be and the same hereby is reversed and the matter remitted to the Surrogates' Court for assessment of tax in accordance with the opinion; and it is further

Ordered that the State Comptroller recover of the respondents, Anna H. Watson and Frederick Watson, executors, the sum of Four hundred and fourteen 95/100 ($414.95) Dollars, the amount of his costs herein, as taxed, and that the same be paid by the said Anna H. Watson and Frederick Watson to the said State Comptroller or to Lafayette B. Gleason, his attorney.

JOHN P. COHALAN,
Surrogate.

92 STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York, Held at Court of Appeals Hall in the City of Albany, on the Seventh Day of October A. D. 1919.

Present, Hon. Frank H. Hiscock, Chief Judge, presiding.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Order on Motion for Reargument.

A motion for a reargument of the above cause having been heretofore made upon the part of the executors herein and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars' costs and necessary printing disbursements.

A Copy.

[SEAL.]

WILLIAM J. ARMSTRONG,
Deputy Clerk.

93 [Endorsed:] Surrogates' Court, New York County. In the Matter of the Transfer Tax Upon the Estate of Charles W. Watson, Deceased. Copy. Original Order on Motion for Reargument with Notice of Entry. Lafayette B. Gleason, Attorney for State Comptroller, Office and P. O. Address, Woolworth Building, Manhattan, New York City.

[Stamped:] Received Dec. 4, 1919. Ent'd. M. & B., S. J. & R.

94 Surrogates' Court, New York County.

In the Matter of the Transfer Tax Upon the Estate of Charles W. Watson, Deceased.

A motion for reargument in the Court of Appeals of the above cause having been heretofore made upon the part of the Executor, and an order of the Court of Appeals having been duly made denying the said motion with $10.00 costs, and a certified copy of said order having been filed in the office of the Surrogates' Court of the County of New York on the 17th day of December, 1919, it is

Ordered, that the said order of the Court of Appeals be and the same hereby is made the order of this Court, and it is further

Ordered, that the said State Comptroller recover of the Respondents under the Will of Charles W. Watson, the sum of $22.00 the amount of his costs herein as taxed, and that the same be paid by the said Executors to the said State Comptroller or to Lafayette B. Gleason, his attorney.

JOHN P. COHALAN,
Surrogate.

95 [Endorsed:] Surrogates' Court, New York County. In the Matter of the Transfer Tax Upon the Estate of Charles W. Watson, Deceased. Copy. Original. Order and Notice of Settlement. Lafayette B. Gleason, Attorney for State Comptroller. Office and P. O. Address, Woolworth Building, Manhattan, New York City. Rec'd Dec. 17, 1919.

96 STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the ninth day of December A. D., 1919.

Present, Hon. Frank H. Hiscock, Chief Judge, presiding.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the executors of the last will and testament of Charles W. Watson, deceased, the respondents herein, and papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. Remittitur amended by inserting therein the following: "And it appearing that the construction of the Constitution of the United States was directly involved in the appeal below before the Appellate Division of the Supreme Court, First Judicial Department, and it also appearing that the question whether that statute of the State of New York, Section 2 of Chapter 700 of the Laws of 1917, being entitled Section 221-*b*, 'Additional Tax on investments in certain cases,' and being a part of Article X of the Tax Law of the State of New York, contravenes and is repugnant to the provisions
97 of the Constitution of the United States, including the equal protection of the laws clause and due process clause of said Constitution contained in the 14th amendment, was presented to and determined by the Court of Appeals."

(A Copy.)

[Seal of State of New York Court of Appeals.]

R. M. BARBER,
Clerk.

[Endorsed.]

State of New York. In Court of Appeals. In the Matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Copy. Order and notice of filing. Eustace Conway, Att'y for Exec'rs. #66 B'way, N. Y. City.

SIR:

Please take notice that within is a copy of an order this day duly entered and filed in the office of the clerk of the Court of Appeals, New York, Dec. 9, 1919.

EUSTACE CONWAY,
66 B'way, Borough of Manhattan, New York City, New York.

To Lafayette G. Gleason, Attorney for State Comptroller.

Due service of a Copy of the within is hereby admitted.
Dated 29 day of Dec., 1919.

LAFAYETTE B. GLEASON,
Att'y for State Comptroller.

99 At a Term of the Surrogates' Court of the County of New York Held at the Hall of Records on the 26" day of December, 1919.

Present, the Honorable John P. Cohalan, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

The Executors of the Last Will and Testament of Charles W. Watson, deceased, having made a motion before the Court of Appeals to amend the remittitur from the Court of Appeals in the above entitled matter by inserting therein the following:

"And it appearing that the construction of the Constitution of the United States was directly involved in the appeal below before the Appellate Division of the Supreme Court, First Judicial Department, and it also appearing that the question whether that statute of the State of New York, Section 2 of Chapter 700 of the Laws of 1917, being entitled Section 221-*b*, 'Additional Tax on investments in certain cases', and being a part of Article X of the Tax Law of the State of New York, contravenes and is repugnant to the provisions of the Constitution of the United States, including the equal protection of the laws clause and due process clause of said Constitution contained in the 14th amendment, was presented to and determined by the Court of Appeals",

and the said Court of Appeals, after due deliberation, having granted such motion, and the order making such amendment having been made the 9th day of December, 1919, and a certified copy thereof filed in the office of the Clerk of the Surrogates' Court
100 of New York County on the 17th day of December, 1919, now on motion of Eustace Conway, attorney for the said executors,

Ordered that the said order and judgment of the Court of Appeals amending the remittitur as aforesaid be and the same is hereby made the order and judgment of this Court.

JOHN P. COHALAN,
Surrogate.

101 [Endorsed.]

Surrogates' Court, New York County. In the Matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Copy order and notice of entry. Eustace Conway, attorney for executors, 66 Broadway, Borough of Manhattan, City of New York.

Please take notice that within is a copy of an order this day duly entered and filed in the office of the Clerk of this Court.
New York, Dec. 26, 1919.

EUSTACE CONWAY,
Attorney for Executors.

66 Broadway, Borough of Manhattan, New York City, New York.

To Lafayette B. Gleason, Esq., Attorney for State Comptroller, 233 Broadway, Borough of Manhattan, City of New York.

Due service of a copy of the within is hereby admitted.
Dated 29 day of Dec., 1919.

LAFAYETTE B. GLEASON,
Att'y for State Comptroller.

102 At a Term of the Surrogates' Court, Held in and for the County of New York, at the Hall of Records in the City of New York, on the 5th day of January, 1920.

Present: Hon. James A. Foley, Surrogate.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

On the annexed consents, it is hereby
Ordered that Stetson, Jennings & Russell, of 15 Broad Street, Borough of Manhattan, City of New York, New York, be and they hereby are substituted as attorneys for Anna H. Watson and Frederick Watson, as executors of the last will and testament of Charles W. Watson, deceased, in the above entitled matter, in the place of Eustace Conway.

JAMES A. FOLEY,
Surrogate.

103 Surrogates' Court, New York County.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

It is hereby stipulated and consented that Stetson, Jennings & Russell, of 15 Broad Street, Borough of Manhattan, City of New York, New York, be substituted as attorneys for the executors, Anna H. Watson and Frederick Watson, of the last will and testament of

Charles W. Watson, deceased, in the above entitled matter, in the place of Eustace Conway, and that an order to that effect may be entered without notice.

Dated, January 3, 1920.

EUSTACE CONWAY,
Attorney for Executors, Anna H. Watson and Frederick Watson, of the Last Will and Testament of Charles W. Watson, Deceased.
ANNA H. WATSON,
Executor of the Last Will and Testament of Charles W. Watson, Deceased.

104 STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of January, 1920, before me personally came Anna H. Watson, to me known and known to me to be the individual described in and who executed the foregoing consent, as executors of the last will and testament of Charles Watson deceased, and she duly acknowledged to me that she executed the same, as such executor.

HANNAH JACQUES,
Notary Public, Kings Co.

Clerk's No. 33.
Kings Co. Reg. No. 124.
N. Y. Co Clerk's No. 62.
N. Y. Co. Reg. No. 10046.
Expires March 30, 1920.

Please take notice that within — an order this day duly entered and filed in the office of the clerk of this court. New York, Jan. 5, 1920. Stetson, Jennings and Russell, Attorneys for Executors. 15 Broad Street, Borough of Manhattan, New York City, New York. To Eustace Conway, Esq., Attorney for Executors; Lafayette B. Gleason, Esq., Att'y for State Comptroller.

[Endorsed:] Surrogates' Court, New York County. In the matter of the Transfer tax upon the Estate of Charles W. Watson, Deceased. Order and consents to substitution of attorneys and notice of entry. Stetson, Jennings & Russell, attorneys for Executors, 15 Broad Street, Borough of Manhattan, City of New York, New York.

Ent'd Jan. 5, 1920.

The service of a Copy of the within is hereby admitted.
Dated 7 day of Jan., 1920.

LAFAYETTE B. GLEASON,
Att'y for State Comptroller.

106 Supreme Court of the United States.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Assignment of Errors.

Now comes Anna H. Watson and Frederick Watson as executors of the last Will and Testament of Charles W. Watson, deceased, by Stetson, Jennings & Russell, their attorneys, and in connection with their petition for a writ of error, show that in the record and proceedings and in the rendering of the final order or degree of the Surrogates' Court of the County of New York, State of New York, upon the remittitur from the Court of Appeals of the State of New York in a matter wherein the petitioners and the Comptroller of the State of New York are parties, there is manifest error in this, to wit:

First. That the Court erred in holding that Section 2 of Chapter 700 of the Laws of 1917 of the State of New York, being an Act entitled "An Act to amend the tax law, in relation to the tax on investments and transfers", approved June 1, 1917, the said Section 2 of such chapter being entitled, "§221-*b* Additional tax on investments in certain cases", is constitutional and does not violate the 14th Amendment to the Constitution of the United States.

107 Second. That the Court erred in holding that Section 2 of Chapter 700 of the Laws of 1917 of the State of New York, being an Act entitled "An Act to amend the tax law, in relation to the tax on investments and transfers," approved June 1, 1917, the said Section 2 of such chapter being entitled "§221-*b*, Additional tax on investments in certain cases", is constitutional and does not violate the 14th Amendment to the Constitution of the United States, and does not deprive the petitioners, Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased; the estate of Charles W. Watson, deceased, and all parties having an interest therein, of the equal protection of the laws, nor deprive the petitioners, Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased; the estate of Charles W. Watson, deceased, and all parties having an interest therein, of property without due process of law.

Third. That the final order or decree herein violates the Fourteenth Amendment to the Constitution of the United States in that it takes the property of the plainiffs-in-error without due process of law and denies them the equal protection of the law.

Wherefore Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, pray that the final order or decree aforesaid may be reversed and

annulled, and for such other and further relief as may be just and proper.

STETSON, JENNINGS & RUSSELL,
Attorneys for Anna H. Watson and Frederick Watson, as Executors of the last Will and Testament of Charles W. Watson, Deceased.

Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

108 [Endorsed:] Supreme Court of the United States. In the matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Assignment of Errors. Stetson, Jennings & Russell, Attorneys for Plaintiffs in error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

109 Supreme Court of the United States.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Petition for Writ of Error.

The Petition of Anna H. Watson and Frederick Watson, as executors of the last Will and Teastament of Charles W. Watson, deceased, by Stetson, Jennings & Russell, their attorneys, hereby sets forth that on or about the 7th day of October, 1919, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of the Comptroller of the State of New York and against the plaintiffs-in-error above named, and afterwards and on or about the 2nd day of December, 1919, the records and proceedings in said cause having been remitted to the Surrogates' Court of the County of New York, State of New York, said final order and judgment of the Court of Appeals were made and entered as the final order and decree of said Surrogates' Court, in which final decree and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, all of which will more in detail appear in the assignment of errors which is filed with this petition. That this was a proceeding to ascertain and fix
the amount of transfer tax payable to the State of New York
110 by the Estate of Charles W. Watson, deceased.

That the said Surrogates' Court of the County of New York, State of New York, upon the remittitur from the Court of Appeals of the State of New York is the highest court of the said State of New York in which a decision in this matter can be had.

A printed copy of the record in the said Court of Appeals is herewith submitted, together with a copy of the order entered in the office of the Clerk of the Surrogates' Court of the County of New

York, State of New York, on the 26th day of December, 1919, making the order and judgment of the Court of Appeals amending the remittitur the order and judgment or decree of such Surrogates' Court.

A copy of the opinion of the said Court of Appeals is also submitted herewith.

Wherefore, Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, petition and pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Surrogates' Court of the County of New York, State of New York, and the Surrogates thereof, for the correction of errors and the reversal of the final order and decree so complained of, and that a copy of the record, proceedings and papers in this matter, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 3rd day of January, 1920.

STETSON, JENNINGS & RUSSELL,
Attorneys for Petitioners.

Office and post office address, No. 15 Broad Street, Borough of Manhattan, City of New York.

Allowed.

111 [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Petition for Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiffs in Error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

112 Supreme Court of the United States.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

Order of Allowance of Writ of Error.

The above entitled matter coming on to be heard upon the petition of Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, therein, for a writ of error from the Supreme Court of the United States to the Surrogates' Court of the County of New York, State of New York and the Surrogates thereof, and upon examination of said petition and the record of said matter, and desiring to give the petitioners an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and is hereby allowed from this Court to the Surrogates' Court, County of New York, State of New York, and the Surrogates thereof.

January 6, 1920.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

113 [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Order of Allowance of Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiffs in Error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

114 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Surrogates of the Surrogates' Court of the County [SEAL.] of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a final order or decree which is in the said Surrogates' Court upon a remittitur from the Court of Appeals of the State of New York before you, or one of you, being the highest court of law or equity of the said State in which a decree or decision could be had in the said matter of the transfer tax upon the estate of Charles W. Watson, deceased, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, upon the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution of the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, a manifest error hath happened to the great damage of the said Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, as by their petition appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties
115 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by

LOUIS D. BANDEIS,
Justice of the Supreme Court of the United States.

116 [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax Upon the Estate of Charles W. Watson, Deceased. Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiffs in Error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

117 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the State Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Surrogates' Court of the County of New York, State of New York, wherein Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, Deceased, are the plaintiff-in-error, and you are the defendant-in-error, to show cause, if any there be, why the final order or decree rendered against the said plaintiffs-in-error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States this 6th day of January in the year of our Lord one thousand nine hundred and twenty.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

118 [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax Upon the Estate of Charles W. Watson, Deceased. Citation. Stetson, Jennings & Russell, Attorneys for Plaintiffs in Error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

119 Supreme Court of the United States of America.

Filed Jan'y 8, 1920.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased; ANNA H. WATSON and FREDERICK WATSON, as Executors of the Last Will and Testament of Charles W. Watson, Deceased, Plaintiffs-in-Error.

Bond on Appeal.

The within bond is hereby approved.
Dated, Jan: 7, 1920.

JAMES A. FOLEY,
Surrogate.

Know all men by these presents, That National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, is held and firmly bound unto the Comptroller of the State of New York in the sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said the Comptroller of the State of New York; for the payment of which well and truly to be made, — bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 5th day of January, 1920.

Whereas, the above named Anna H. Watson and Frederick Watson as Executors of the last Will and Testament of Charles W. Watson, deceased, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the final order and judgment rendered in the above entitled suit, by a Judge of the Court of Appeals of the State of New York.

Now, therefore, the condition of this obligation is such, that if the above named Anna H. Watson and Frederick Watson as Executors of the Last Will and Testament of Charles W. Watson, deceased, shall prosecute said writ to effect, and answer all damages and costs if they fail to make said writ good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
By H. E. EMMETT,
[SEAL.] *Resident Vice-President.*

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

Approved:
LOUIS D. BRANDEIS,
Associate Justice Supreme Court U. S.

120 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 5th day of January, 192 before me personally came H. E. Emmett, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Anna H. Watson and ano. etc., as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of H. E. Emmett is

the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Nine Million dollars.

H. E. EMMETT,
(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 5th day of January, 1920.

[SEAL.]

F. E. FIELDS,
Notary Public, etc.

Notary Public for Queens County No. 2881.
Certificate filed in New York Co. 300—Bronx 11—Kings 27—Richmond Co.
New York Register's Office 10224.
Bronx Register's Office 253.
Kings Register's Office 198.
My commission expires March 20, 1920.

[Endorsed:] Supreme Court of the United States. In the matter of the Transfer Tax upon the Estate of Charles W. Watson, deceased, *against* Anna H. Watson and Frederick Watson, as Executors of the last Will and Testament of Charles W. Watson, deceased, plaintiffs-in-error. Bond on appeal. Surety: National Surety Company.

121 STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of New York County, pursuant to a writ of error directed to the Honorable the Surrogates of the Surrogates' Court of the County of New York, which said writ was allowed by the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, signed by the Clerk of said Court on the 6th day of January, 1920, do hereby certify the writing hereto attached to be a true, complete and perfect copy of the record, assignment of errors and all proceedings in the proceedings entitled "In the Matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased" as the same remains on file and on record in said case in my office. That attached to said papers is the writ of error, allowance of writ of error and the citation with proof of service thereof, all filed in the office of this Court and the same are the originals thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York, this second day of March, 1920.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

122 (Reported in 226 N. Y. at page 384.)

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

(Decided May 20, 1919.)

Appeal by the comptroller of the state of New York from an order of the Appellate Division, first department, affirming an order of the surrogate which denied an appeal by the comptroller and confirmed the report of the appraiser in fixing a transfer tax. The surrogate and the Appellate Division have decided that section 221-*b* of the Tax Law as added by chapter 700 of the Laws of 1917 is unconstitutional.

Lafayette B. Gleason and Alexander Otis for appellant.

Eustis Conway for respondents.

Rumsey & Morgan, Stetson, Jennings & Russell, Louis O. Van Doren, Brackett, Todd, Wheat & Wait, for interveners.

CRANE, *J.*:

The question presented for determination is whether section 221-*b* of the Tax Law [Cons. Laws, ch. 60], added by chapter 700 of the Laws of 1917, is constitutional. The lower courts have held it to be unconstitutional. The section reads as follows:

"Additional tax on investments in certain cases. Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-*a*, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; or unless the decedent was actually engaged in the bona fide purchase and sale of investments as a business, and at the time of his death had maintained an office or place of business in this state for the carrying on of the actual bona fide business of purchasing and selling investments, as distinguished from the purchase thereof for

investment purposes, and had owned and held such investment for sale for the purpose of his business and not as an investment for a period of not more than eight months prior to his death."

The personal property of an individual, resident in the state of New York, was, at the time of this enactment, subject to two
123 methods of assessment and taxation. By section 6 and section 8 of the Tax Law he was to be assessed on the full value of his personal property in the tax district where he resided, allowance being made for his debts.

By article XV of the Tax Law the owner of personal property coming within the description of investments therein defined could pay to the state a tax of $0.75 per hundred dollars upon the face value of such investments and be exempted from any other local or state tax.

Under this system of assessment and taxation certain well-known facts and conditions existed regarding taxation upon personal property which must have been in the mind of the legislature at the time of the above enactment. A man was not compelled to tax himself or to present to the tax officers of his resident district a full and complete list of his securities. Assessments upon personal property or investments were thereupon made according to such meagre information as the assessors could obtain or else according to appearance, reputation or surmise. It was also a well-known fact that in many local communities no attempt was made to assess personalty at its full value, as according to the tax rate it would have worked extreme hardship.

Under the Laws of 1911, chapter 802, as thereafter amended, the tax provided by the state upon investments was permissive and not compulsory, the alternative being that if the bonds were not submitted in accordance with the methods provided by that law they were subject to an assessment by the locality as before stated.

Under these conditions it was a matter of common knowledge that some owners submitted all or part of their bonded investments to the state tax, others paid upon a limited local assessment, and others not at all, and that a very large part of this kind of property went untaxed altogether.

Such were the facts as developed in this estate of Charles W. Watson, deceased, which is typical and not exceptional. When he died in August, 1917, leaving a net estate of $470,256.95, $109,470.73 of this consisted of assessable bonds upon which his last assessment in 1914 amounted to only $30,000; since 1914 he had acquired securities valued at $59,284.54 which had not been assessed at all. The bonds had not been submitted under the State Tax Law. Thus Charles W. Watson had possessed for some years $168,755.27, of which only $30,000 had paid a tax.

This kind of property, therefore, divided itself into three classes, or if we prefer, varied in three different ways under the operation of the Tax Law, by reason of circumstances and conditions.
124 Some of the investments yielded to local assessment, others submitted to the state tax and still a large part yielded no tax.

These facts were before the legislature when they sought to reach this untaxed property in the methods devised by section 221-*b* of the

Tax Law. Article X of that law had already established an inheritance tax varying in amount according to the degrees of relationship of the transferee. To this was added, by section 221-*b*, an additional tax of 5% upon those investments passing by will or distribution which had not been assessed locally or paid the state stamp tax.

(In considering the constitutionality of this provision it has been suggested that while the state may enact an inheritance tax it must treat all personal property alike and cannot classify it according to nature or kind. Why this suggestion should separate personal property from realty I need not now stop to consider.) That in the development of taxation personal property has varied in treatment and in disposition is evidenced by the Mortgage Tax Law (People ex rel. Eisman v. Ronner, 185 N. Y. 285), the bank stock assessment (People ex re-. Bridgeport Savings Bank v. Feitner, 191 N. Y. 88; Amoskeag Savings Bank v. Purdy, 231 U. S. 373), the stock transfer tax (People ex rel. Hatch v. Reardon, 184 N. Y. 431; Matter of Ball, 161 App. Div. 79; Matter of Church, 176 App. Div. 910) and the special franchise tax (People ex rel. Met. St. Ry. Co. v. State Bd. Tax Commissioners, 174 N. Y. 417).

In dealing with a law's constitutionality we are examining the question of legislative powers, or to be accurate, the limitation placed by constitutions upon power. Whether the le gislature has acted wisely, made a proper choice, created difficulties, worked hardships or been unfair to a class or to a particular kind of property is never indicative of a limitation. Limitations are to be found in the words and intendment of the Constitution and the fundamental principles of government embodied therein. The taxing power, both direct and through an inheritance tax, is very broad and submits to few restrictions. Such laws need not be submitted to courts for their approval and can only meet with disapproval when some fundamental principle has been violated. In speaking of the legislative power, whether it be a police power, a taxing power or any other power of like nature, we have no ready-made formula which can be easily applied but must be governed by the principles developed in the law, either by a long series of legislation or by custom, or by judicial expression. However accurate may be our logical process we must not start with assumed premises, but with those furnished us by the authorities.

Although repeating what has heretofore been said by this court we turn to a few of these authorities to ascertain the rule which
125 must be applied to the new state of facts arising in this case.

This court said, through Gray, J., in People ex rel. Eisman v. Ronner (185 N. Y. 285, 289) regarding the Mortgage Tax Law:

"I cannot perceive any valid reason why the legislature could not devise a scheme for raising revenues for the general government and for the various local governments by the apportionment of the proceeds of a tax laid upon a certain species, or class, of possessions. * * * It [the legislature] may change the methods, or rate, of taxation, and it may classify new subjects for taxation. * * * The purpose of a system of taxation; the apportionment of a tax and the property, or persons, to be affected are

matters within the legislative discretion. * * * There is no constitutional guaranty that taxation shall be just and equal; though underlying this court's governmental power, and implied from the nature of our political institutions, is the principle that taxation shall be equal, in the sense that it shall not be arbitrary and that there shall be no discrimination against persons, by laying greater burdens upon one than are laid upon others in the same calling or condition."

We said in People ex rel. Hatch v. Reardon (184 N. Y. 431), regarding the constitutionality of the Stock Transfer Act:

"The classification made by selecting one kind of property and taxing a transfer of that only, is assailed as so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws.

"All taxation is arbitrary, for its compels the citizen to give up a part of his property; it is generally discriminating, for otherwise every thing would be taxed, which has never yet been done, and there would be *on* exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation * * *

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings." (Quoting from Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562.)

Turning to Genet v. City of Brooklyn (99 N. Y. 296, 306) we find it there stated that

"The power of taxation being legislative, all the incidents
126 are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether the tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the legislature and in respect to which its determination is final." (See, also, Matter of Wendel, 223 N. Y. 433.)

Passing from the consideration of the general taxing power to the authorities touching the inheritance tax, we find the power almost unlimited. The state having the power to abolish testamentary dispositions and the right to pass property by distribution we would naturally conclude that it could also determine the nature or kind of property that should pass, or could place a limitation or condition upon the transfer by death of any or all property. (See what Mr. Justice Holmes said in Chanler v. Kelsey, 205 U. S. at page 479.) But it is unnecessary for us to touch upon the extent of the power as we shall confine our attention to the facts as presented and determine whether the power exists in this instance.

We have had occasion to say in Matter of Delano (176 N. Y. 486, 491):

The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others."

The case of United States v. Perkins (163 U. S. 625, 627) dealt with a tax upon personal property bequeathed by will to the United States. The opinion states:

"While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. * * * In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to
127 impose. * * * Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

The opinion also quotes a statement of Mr. Chief Justice Taney taken from Mager v. Grima (8 How. 490, 493): "* * * the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The principles enumerated in Magoun v. Illinois Trust & Savings Bank (170 U. S. 283, 288) may be helpful:

"The right [says the opinion] to take property by devise or consent is a creature of the law, and not a natural right—a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

The inheritance tax in this case was attacked as being arbitrary and causing discriminations and creating inequality in the burdens of taxation. Writing of the requirements of the Fourteenth Amendment and the equal protection of the laws to which all persons are entitled, Mr. Justice McKenna says:

"It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. * * * Mr. Justice Field said in Mobile County v. Kimball, 102 U. S. 691, 'that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.' * * * There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the questions in controversy."

128 Referring to the Fourteenth Amendment and the State Inheritance Tax Laws, the case of Campbell v. California (200 U. S. 87, 95) gave occasion for Mr. Justice White to say:

"With the motives of public policy which may induce a State to prefer near relatives by affinity to collateral relatives, we are not concerned, since the Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority."

The provisions of the New York Inheritance Tax Law, chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885, were under review of Beers v. Glynn (211 U. S. 477, 484). A discrimination and inequality existed, for by this law the personalty of a non-resident decedent who owned realty in the state of New York was taxed, whereas no provision was made for taxing the personalty of a non-resident decedent who had not owned any realty within the state. Mr. Justice Brewer said:

"But though the operation of the statutes creates a difference, this even if intentional is not of itself sufficient to invalidate the tax. The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method."

From what has been said it will be apparent that the discretion given to the legislature to tax property passing by will or inheritance is very broad.

Assuming without deciding that the discretion to classify personal property which must pay an inheritance tax before passing by will or inheritance is limited to a classification which is based upon some reason and not the mere caprice of the legislature, this present law under discussion comes within such a rule.

Holding up the section under discussion for comparison with these authorities as a pattern, does it fall within or without the line of constitutional limitation? In the first place we may consider this tax as though it were the first and only tax placed upon transfers. The fact that it is an additional tax does not change the principle involved. The tax is then, one placed upon the transfer of property at the time of death which has not theretofore paid any tax, local or state.

The objection cannot be pressed, that the beneficiary under the will is punished for the misdeeds of the ancestor in not paying a local or state tax. The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid. The state, therefore, having the power to place an inheritance tax upon property which has escaped taxation during the lifetime of the testator, it is no valid objection that the legatee may deem himself punished by the circumstance. Neither is there foundation in the authorities for the assertion or implication that the inheritance tax laws must look with indifferent eye upon the kind of property transferred and cannot single out personalty as distinguished from realty and the like. Difficulties in practical application of the statute are perhaps more imaginary than real, but if they do exist, such difficulties are a matter for legislative and not judicial consideration. (Matter of McPherson, 104 N. Y. 306, 324.) Slight inequalities or injustices which may folllow from the application of this law as it is applied by the taxing authorities are not in and of themselves constitutional objections (Matter of White, 208 N. Y. 64), unless they become so great as to violate the principles stated. It has been said that this is not classification but a mere arbitrary tax upon the right to transfer investments. Is there not, at least, a semblance of reason in seeking to tax upon inheritance property which has not been taxed locally or for state purposes, when such fact can only be discovered upon the death of the owner? The matter at least permits of argument and is not so capricious and whimsical as to be purely arbitrary. It has in it at least an effort for the equalization of taxation and the adjustment of the burdens of government.

129

The fact that other bodies have come to the same conclusion as our own legislature may have a slight bearing upon the element of reason in this tax and its freedom from mere arbitrary action.

Thus Connecticut has placed an estate tax upon property upon which no town or city tax has been assessed during the year preceding death. (Section 1190, General Statutes of Conn.) And Louisiana exempts from a transfer tax property which has borne its just proportion of taxes prior to inheritance. (Quoted in note to Cahen v. Brewster, 203 U. S. 543; art. 235 and art. 236 of the Const. of La.; Succession of Pritchard, 118 La. Ann. 883; Succession of Westfeldt, 222 La. Ann. 836.)

The objection to a tax that it is an arbitrary discrimination must be approached with the greatest caution. (New York ex rel. Hatch v. Reardon, 204 U. S. 152, 158.)

A further objection has been urged upon us. It is that the act illegally exempts dealers in investments and thus makes this law unequal in operation.

130 By section 336 of the Tax Law, as amended by chapter 700 of the Laws of 1917, the owner of any investment, as defined by the article (Article XV), shall be assessed upon such an investment in the tax district where he resides upon the fair market value thereof without deduction for his just debts, except that such deduction may be allowed to any person in respect to any investment which, for the purpose of his business, shall be temporarily owned and held for sale by him, then actually engaged in the bona fide purchase and sale of such investments as a business. Such deduction shall not be allowed in respect to such investments held for a longer period than eight months.

Section 221-*b* also contains a like exception from the inheritance tax upon property which has not paid a local or state tax. That is, the section does not apply to a decedent who was actually engaged in the bona fide purchase and sale of investments as a business at the time of his death and had and maintained an office in this state for that purpose. The exception does not apply if the investments are held for eight months. All exemptions do not render tax laws unconstitutional. There are many reasons for exempting a certain amount of property, or a class of property, or institutions, such as charitable organizations and persons carrying on religious work. (American Sugar Refining Co. v. La., 179 U. S. 89; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U. S. 132, 140.)

Dealers in investments, as a business, disposing of their bonds as vendors or brokers within a few months after acquisition cannot be considered the holders of such property for investment purposes. They may sell indifferently to persons within and without the state; they may hold a large amount of such bonds with borrowed capital for the purpose of organizing or developing corporate enterprise. It cannot reasonably be expected that a dealer would pay the present state tax on all such securities passing through his hands in transfer from seller to purchaser, or held by him solely for sale on profit. There is a reason, we think, for such an exemption which saves this law from being a violation of that equality demanded of legislation.

Illustrations of how this tax may work inequitably, if the exemptions are allowed to certain relatives under section 221, have been conceived by the courts below. Sufficient to say that in our judgment the exemptions do not apply to section 221-*b*. It is a flat tax of five per cent upon the transfer of property not theretofore taxed as specified. Reference to the investments taxable under this article means the investment securities specified by article XV passing by inheritance and taxed as stated in article X. The exemp-

131 tions are classified by section 221 as exceptions and limitations and are not continued to cover the additional tax.

Again, it must be noted, that if the amount of an estate is eaten

up by debts so that the assets consisting of these investments do not pass to anybody, of course, there can be no tax. Likewise the investments should pay their proportionate part of the debts without tax.

One of the intervenors has taken the position that the said investment tax, article XV of the Tax Law, is wholy unconstitutional, in that it withdraws a certain portion of property from personal assessment by local officials. The claim is made that this is contrary to the local self-government policy as enacted into the State Constitution by section 2, article X, and he refers to People *ex* rel. Town of Pelham v. Vil. of Pelham (215 N. Y. 374).

No attempt is made by this Investment Tax Law to give to state officials the right to tax for local purposes, or the functions of local representatives. The state has the right to tax for its own purposes. A case might arise where so much property was withdrawn from local assessment as to deprive local officials substantially of all their power, but such is not this case—far from it.

While the assessment of property for the purposes of taxation in this state has always been a function of local officers, their duties may be modified or regulated by the legislature so long as there is no substantial impairment of the right of home rule or no intent or attempt to evade the constitutional provisions. (People ex rel. Wood v. Draper, 15 N. Y. 541; Astor v. Mayor, etc., of 62 N. Y. 567, 573; People ex rel. Devery v. Coler, 174 N. Y. 103; Mayor etc., of N. Y. v. Tenth National Bank, 111 N. Y. 446.)

By the Mortgage Tax Law (People ex rel., Eisman v. Ronner 185 N. Y. 285) the assessment of mortgages was taken from the local authorities and a flat rate fixed by the state, one-half of the moneys going to the state and one-half to the locality. The assessors no longer had any judicial discretion in the assessment of mortgages. All the duties and powers, however, of the assessors were left intact except as to this species of property. The legislature, by section 4 of the Tax Law, has created a list of exemptions from general taxation which so far as I can discover have never been questioned as illegal because in violation of article X, section 2. In the franchise tax case (People ex rel. Met. St. Ry. Co. v. State Bd. Tax Commissioners, 174 N. Y. 417) it is recognized by this court that certain conditions or nature of property which results in its escape from taxation may authorize the legislature to provide means and methods for its assessment.

In this case of the bond investment tax, a large amount
132 of property could not be reached for assessment by the local authorities. As above stated, there was no means under the law to determine who held such securities and to what amount. The estates passing through the Surrogates' Courts bore witness to the inability of the existing tax system to equalize the burdens and to reach all property.

To remedy this condition, the legislature passed article XV of the Tax Law which permitted a flat rate of tax upon such investment securities as might otherwise go untaxed; and, with the intent, no doubt, of inducing bondholders to make known their

holdings and to submit to this tax, it exempted such property from the inequality and irregularities of local assessment. This was an attempt to reach a class of property which was not bearing its proportionate part of governmental expenses, to make just the tax laws and to meet a situation which for a long time had been apparent to every one familiar with the subject and which was quite difficult to regulate. The nature of the holdings made the local assessments many times unequal and unjust, often bearing heavier upon a small owner than upon one possessed of large amounts unkown to the assessors.

The withdrawal of property by exemption from local assessment may be so arbitrary or so extensive as to interfere with local self-government and with the principles of home rule. Such instances would clearly be unconstitutional.

The tax on investments, however (Article XV of the Tax Law), is not, in our opinion, an evasion or an attempt to evade the home-rule provisions of the Constitution, was not passed with the intention of interfering with the local authorities in their taxing powers and is not a substantial change in the duties of assessors.

As I stated in the beginning, the facts of this controversy are very simple and free from complication. The testator left hardly any debts, and securities within the Investment Tax Law which had not been subjected to any tax by local or state authorities. The circumstances were easily ascertainable and are not disputed. No difficulty has arisen in ascertaining and fixing the amount of the tax.

We treat this case, therefore, as it is presented without trying to devise instances where the law might violate fundamental principles. We cannot now see how it is unconstitutional. Time is more fecund than the mind and instances may arise hereafter which may present other and further questions regarding this law. Experience in application may furnish information which we do not now possess, and as to such questions we reserve the right to consider them as and when they arise.

133 Every presumption is in favor of the constitutionality of an act of the legislature and, if the Constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction. (People ex rel. Met. St. Ry. Co. v. Tax Commissioners, 174 N. Y. 434, 437.)

It is said that we must treat the Investment Tax Law as though it were a compulsory tax upon the face value of bonds or the actual value without any opportunity to be heard as to the amount assessed. The tax on investments is not compulsory but optional. An owner is not compelled to submit to a state tax. He may register his bonds with the state comptroller and pay a certain amount according to face value and thus free the securities from local assessment. If he does not choose to do this he can submit to local assessment which is according to actual value with full opportuntiy to be heard. How can it be claimed that article XV of the Tax Law is compulsory or upon what theory can an owner say that he was forced to pay

the state tax when he does so voluntarily in order to escape a greater tax according to actual value? We are seeking to force upon an owner a situation which he neither welcomes nor has requested. The tax under the inevstment law has been in operation since 1911 and millions of dollars have been paid to the state under its reasonable regulations. It has never yet been directly attacked.

When we pass upon the constitutionality of article XV, known as the tax on investments, we cannot read into it any other law, nor hold it unconstitutional because of the provisions of article X, providing for tax on transfers. The two laws are separate and distinct and governed by entirely different principles. Leaving out of consideration entirely section 221-*b*, let us determine first whether or not the tax on investments is illegal. We have to construe it as compulsory in order to make it illegal. There is nothing whatever in the law itself that compels submission to a state tax. It is entirely voluntary. The compulsion is said to be in section 221-*b* providing for a tax upon property passing at death. As heretofore stated by me in this opinion the state is free to place an inheritance tax upon any property passing by death to others. Having placed such a tax upon the actual value of bonds which have paid neither a local assessment nor a state tax (which is optional and, therefore, legal), there is no ground for holding such inheritance tax unconstitutional. The selection of such property for inheritance tax is within the powers of the legislature.

To say that a man is compelled to pay a state tax in order to avoid this inheritance tax when he could pay the ordinary local assessment upon the actual value of his holding and achieve the same end is carrying the constitutional protection to an unreasonable extent.

What is said about the violation of the "Home-Rule"
134 provision is equally applicable to the Mortgage Tax Law and would render article XI (tax on mortgages) also unconstitutional in spite of People ex rel. Eisman v. Ronner (185 N. Y. 285). The tax here provided is a tax of fifty cents for each one hundred dollars on the principal or obligation secured, half of which goes to the state. Mortgages are not otherwise taxable.

We, therefore, conclude that the estate of Charles W. Watson, deceased, must be assessed under section 221-*b* of the Tax Law, upon that amount of personalty coming within the investment law which was not assessed by the local authorities or over and above the amount assessed and which did not pay any tax to the state.

The order should be reversed, with costs in all courts, and matter remitted to the Surrogate's Court for the entry of a decree in accordance with these directions.

Cuddeback and Hogan, JJ., concur, and Chase, J., concurs in result; Hiscock, Ch. J., Collin and McLaughlin, JJ., dissent.

Order reversed, etc.

135 *Affidavit of No Opinion.*

Surrogates' Court, County of New York.

In the Matter of the TRANSFER TAX UPON THE ESTATE OF CHARLES W. WATSON, Deceased.

STATE OF NEW YORK,
County of New York, ss:

Lee McCanliss, being duly sworn, says:

That he is an attorney at law associated with Messrs. Stetson, Jennings & Russell, attorneys for the plaintiffs-in-error in the above entitled matter, and is familiar with the proceedings had in the above entitled proceedings; that no opinion was rendered by the Court of Appeals of the State of New York in denying the motion for a reargument and no opinion was given by the Surrogate either in making the order upon the remittitur from the said Court of Appeals or upon the order making the order of the Court of Appeals denying the motion for a reargument the order of the Surrogates' Court of New York County; that no opinion was rendered by said Court of Appeals on granting the motion amending the remittitur and no opinion was rendered by the Surrogate in making the order of the Court of Appeals amending the remittitur the order of the Surrogates' Court, New York County.

LEE McCANLISS.

Sworn to before me the 1st day of March, 1920.
[SEAL.] WM. H. BRUDER,
Notary Public, Bronx County No. 52.

Certificate filed in New York County No. 147.

[Endorsed:] Filed March 1st, 1920.

136 Supreme Court of the United States.

In the Matter of the TRANSFER TAX UPON THE ESTATE of CHARLES W. WATSON, Deceased.

Order of Allowance of Writ of Error.

The above entitled matter coming on to be heard upon the petition of Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, therein for a writ of error from the Supreme Court of the United States to the Surrogates' Court of the County of New York, State of New York and the Surrogates thereof, and upon examination of said petition and the record of said matter, and desiring to give the peti-

tioners an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and is hereby allowed from this Court to the Surrogates' Court, County of New York, State of New York, and the Surrogates thereof.

January 6, 1920.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

137 [Endorsed:] Supreme Court of the United States. In the matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Order of allowance of writ of error. Stetson, Jennings & Russell, Attorneys for Plaintiffs in error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

[Stamped:] Surrogates' Court N. Y. County. Filed Jan. 7, 1920.

Copy received January 7, 1920.
LAFAYETTE B. GLEASON,
Atty. for State Comptroller.

138 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Surrogates of the Surrogates' Court of the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a final order or decree which is in the said Surrogates' Court upon a remittitur from the Court of Appeals of the State of New York before you, or one of you, being the highest court of law or equity of the said State in which a decree or decision could be had in the said matter of the transfer tax upon the estate of Charles W. Watson, deceased, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, upon the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution of the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, a manifest error hath happened to the great damage of the said Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, deceased, as by their petition appears. We being willing that error, if any hath been, should

139 be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by:
LOUIS D. BRANDEIS,
Justice of the Supreme Court
of the United States.

140 [Endorsed:] Supreme Court of the United States. In the matter of the Transfer Tax upon the Estate of Charles W. Watson, Deceased. Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiffs in error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

[Stamped:] Surrogates' Court N. Y. County. Filed Jan. 7, 1920.

Copy received January 7, 1920.
LAFAYETTE B. GLEASON,
Atty. for State Comptroller.

141 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the State Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Surrogates' Court of the County of New York, State of New York, wherein Anna H. Watson and Frederick Watson, as executors of the last Will and Testament of Charles W. Watson, Deceased, are the plaintiffs-in-error, and you are the defendant-in-error, to show cause, if any there be, why the final order or decree rendered against the said plaintiffs-in-error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 6th day of January, in the year of our Lord one thousand nine hundred and twenty.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

142 [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Charles W. Watson, deceased. Citation. Stetson, Jennings & Russell, attorneys for plaintiffs in error, 15 Broad Street, Borough of Manhattan, City of New York, New York.

[Stamped:] Surrogates' Court, N. Y. County. Filed Jan. 7, 1920.

Copy received Jan. 7, 1920,

LAFAYETTE B. GLEASON,
Attorney for State Comptroller.

Endorsed on cover: File No. 27,523. New York Surrogates' Court, New York County. Term No. 768. Anna H. Watson and Frederick Watson, as executors of the last will and testament of Charles W. Watson, deceased, plaintiffs in error, vs. The State Comptroller of the State of New York. Filed March 3d, 1920. File No. 27,523.

FILED
APR 15 1919
JAMES D. MAHER,
CLERK

Supreme Court of the United States

October Term, 1918

No. [redacted] 266

In the Matter of the Transfer Tax upon The Estate

of

CHARLES W. WATSON,

Deceased.

Motion and Petition to Advance Case

STETSON, JENNINGS & RUSSELL,
Attorneys for Petitioners.

LEE MCCLAUGHRY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1919.

In the Matter of the Transfer Tax upon the Estate of CHARLES W. WATSON, Deceased.	No. 768

Motion to Advance.

SIR:

PLEASE TAKE NOTICE that upon the annexed petition and upon the Transcript of Record filed herein, the undersigned shall move this Court, at the October Term, 1919, thereof, to be held in the Capitol, at the City of Washington, District of Columbia, on the 19th day of April, 1920, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order directing that the argument of the appeal in this

case be advanced and that the same be set down for a day certain to be fixed by the Court.

Dated, New York, April 7, 1920.

Yours, etc.

LEE McCANLISS,
Counsel for Petitioners Plaintiffs-in-Error,
Office and P. O. Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

To:
JOHN B. GLEASON,
Counsel for Defendant-in-Error,
233 Broadway,
New York City.

HON. JAMES D. MAHER,
Clerk of United States Supreme Court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

In the Matter of the Transfer Tax upon the Estate of CHARLES W. WATSON, Deceased.	No. 768

Petition on Motion to Advance Case.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the executors of Charles W. Watson, deceased, respectfully shows as follows:

I. This case comes before this Honorable Court pursuant to a writ of error granted herein to review a final judgment or decree of the Surrogate's Court, New York County, State of New York, entered on a remittitur from the Court of Appeals of the State of New York.

II. The original proceeding herein was brought to determine the amount of a certain tax due from the estate of Charles W. Watson, deceased, under the provisions of a statute of the State of New York, being Section 2 of Chapter 700 of the

laws of 1917; known as Section 221-b of the Tax Law and entitled "Additional Tax on Investments in Certain Cases." The above section of the Tax Law provides in substance as follows: That upon a transfer, taxable under the New York Transfer Tax Act, of an "investment" a tax of five per cent. of the appraised inventory value of such "investment" is thereby imposed in addition to other transfer taxes unless one of the several taxes therein specified, such as a stamp tax of 20 cents for $100 face value of such securities exempting the same from further taxes for specified periods, had been paid by decedent during his life time, or unless decedent was engaged in the actual bona fide business of purchasing and selling securities and held the securities in question for sale for the purposes of his business, and not as an investment, for a period of not more than eight months prior to his death.

III. On the trial of this proceeding before the Surrogate of New York County, State of New York, your petitioners successfully contended that the above Section of the Tax Law is unconstitutional, arbitrary, confiscatory and discriminatory.

IV. The Surrogates' Court thereupon entered an order declaring said tax to be unconstitutional and invalid, and this order was unanimously affirmed on appeal by the Appellate Division of the Supreme Court, First Judicial Department, of the State of New York.

V. Thereafter an appeal was taken to the Court of Appeals of the State of New York, which Court reversed the decree and order of the lower courts, four judges voting in favor of such reversal and three dissenting, and declared the above section of the Tax Law to be constitutional and valid, and your petitioners thereupon sued out the writ of error now pending in this Court.

VI. Your petitioners further show that decedent, Charles W. Watson, died on the 18th day of August, 1917, leaving a gross estate amounting to substantially $492,803.85, of which sum $232,593.72 consisted of "investment" securities as defined in Article 15 of the Tax Law; the transfer tax thereon, if collected amounting to approximately $11,600.

VII. That a decision is required in this case at the earliest possible date in order to finally determine the validity of the constitutional objections to the said tax law of the State of New York, which objections were specifically presented to and adversely determined by the highest court of New York State as more fully appears from the remittitur and amended remittitur of that court embodied in the record. The said objections have never been presented to or determined by this court and a great number of transfer tax proceedings now pending in New York State involving large sums of money are now awaiting

the final outcome of this pending action which is generally conceded by the bench and bar of New York State to be in the nature of a test case. That your petitioner is informed and believes that the executors and administrators of estates now being administered in the State of New York, pending an adjudication of this appeal, are placed in the uncertain and embarrassing position of being forced to choose between paying a large tax pursuant to a law of doubtful validity and not paying said tax and thereby incurring statutory penalties. That the petition for a rehearing of this case in the said Court of Appeals was presented by a large number of attorneys representing practically all the banks and trust companies in the City of New York. That the Comptroller of the State of New York fully realizes the urgent importance of securing a speedy determination of the questions here involved and joins with your petitioners in this motion to advance as more fully appears by his consent endorsed hereon.

That your petitioners have received numerous inquiries from attornies in this state and in other states regarding the outcome and status of the pending action and are informed and believe that their respective clients have been advised to refuse to pay such transfer taxes unless and until the constitutional objections presented by this writ of error are adversely determined by this court.

Petition on Motion to Advance Case

WHEREFORE your petitioners respectfully pray that this Honorable Court will grant the motion to advance this case on the calendar of this Honorable Court.

Respectfully submitted,

LEE MCCANLISS,
Counsel for Petitioners-
Plaintiffs-in-Error.

The above petition is hereby consented to.

Dated, April 15th, 1920.

JOHN B. GLEASON,
Counsel for Comptroller of State
of New York,
Defendant-in-Error.

FILED
SEP 28 1920
JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 266

ANNA H. WATSON and FREDERICK WATSON, as Executors of the Last Will and Testament of Charles W. Watson, Deceased,

Plaintiffs in Error,

against

THE STATE COMPTROLLER OF THE STATE OF NEW YORK.

In Error to the Surrogate's Court of New York County, State of New York.

BRIEF OF PLAINTIFFS IN ERROR.

STETSON, JENNINGS & RUSSELL,
Attorneys for Plaintiffs in Error,
15 Broad Street,
New York City.

Wm. G. Cannon,

EDWARD R. GREENE,
HAROLD W. BISSELL,
Of Counsel.

INDEX.

	PAGE
Statement	1
Specification of errors	4
Synopsis of argument	4
Point I	8
Point II	32
Point III	34
Conclusion	40

CASES CITED.

Beers v. Glynn (211 U. S. 477)	29, 30
Bell's Gap Rd. v. Penn. (134 U. S. 232)	23
Campbell v. California (200 U. S. 87)	24
Connolly v. Union Sewer Pipe Co. (184 U. S. 540)	23
Cotting v. Kansas City Stock Yards Co. (183 U. S. 79)	23
Dixon v. Jersey City (37 N. J. L. 42)	27
Flint v. Stone Tracy Co. (220 U. S. 107)	31
Gihon, Matter of (169 N. Y. 443)	9
Gulf, Colorado & S. F. Ry. v. Ellis (165 U. S. 150)	23
Hamlin, Matter of (226 N. Y. 407)	9
International Paper Co. v. Mass. (246 U. S. 135)	31
Knowlton v. Moore (178 U. S. 41)	33, 36
Looney v. Crane Co. (245 U. S. 178)	31
Magoun v. Ill. Trust and Sav. Bank (170 U. S. 283)	14, 23, 33, 36, 39

PAGE

Maxwell v. Bugbee (250 U. S. 525) 31
Pacific Express Co. v. Seibert (142 U. S. 339) 24
Pell, Matter of (171 N. Y. 48) 24
Penfold, Matter of (216 N. Y. 163) 9, 33
People ex rel. Farrington v. Mensching (187 N. Y. 8) 23
Postal Tel. Cable Co. v. Adams (155 U. S. 688) 31
Sherman, Matter of (153 N. Y. 1) 9
Southern Pac. Co. v. Denton (146 U. S. 202) 31
State ex rel. Trustees v. Township, etc. (36 N. J. L. 66) 31
United States v. Perkins (163 U. S. 625) 33
Washbourne's Estate (180 N. Y. Supp. 507; 190 App. Div. 140; 229 N. Y. memos) ... 14
Western Union Tel. Co. v. Kansas (216 U. S. 1) 31
White, Matter of (208 N. Y. 64) 33

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 768.

ANNA H. WATSON and FREDERICK WATSON, as Executors of the Last Will and Testament of Charles W. Watson, Deceased, Plaintiffs in Error,

against

THE STATE COMPTROLLER OF THE STATE OF NEW YORK.

BRIEF OF PLAINTIFFS IN ERROR.

Statement.

This appeal is brought upon a writ of error to the Surrogate's Court, County of New York, State of New York, and the Surrogates thereof. Error is assigned as to an order of the Surrogate's Court dated May 29, 1919, making an order of the Court of Appeals of New York an order of the Surrogate's Court. Under the decision of the Court of Appeals a tax is imposed upon the transfer of certain securities as hereafter noted.

Charles W. Watson died August 18, 1917, leaving among other things various investment securi-

ties. Among these securities were certain investments of the appraised value of $59,284.54 which came within the terms of Section 221-b of Article 10 of the New York Tax Law, as inserted by Chapter 700 of the Laws of 1917. The constitutionality of this section is the question at issue. Before quoting this section we will explain briefly its relative position as part of the Tax Law of New York. Chapter 60 of the Consolidated Laws of New York constitutes the "Tax Law." The Tax Law contains various articles, three of which require attention. Article 15, entitled "Tax on Investments" provides for a permissive stamp tax on certain investments, including the kind of investments involved in this case. The payment of the stamp tax exempts the investments generally from taxation under local assessment; but if the stamp tax is not paid the owner is subjected to local assessment upon the investments. Article 1, entitled "Taxable Property and Place of Taxation," provides for local assessment of such property as a basis for the general personal property tax. Article 10 entitled "Taxable Transfers" constitutes the inheritance or succession tax law of New York, Section 221-a in that Article stating the usual inheritance taxes. Section 221-b inserted as above stated in Article 10 reads as follows:

> "Additional Tax on Investments in certain cases. Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-a, of

five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; or unless the decedent was actually engaged in the *bona fide* purchase and sale of investments as a business, and at the time of his death had maintained an office or place of business in this state for the carrying on of the actual *bona fide* business of purchasing and selling investments, as distinguished from the purchase thereof for investment purposes, and had owned and held such investment for sale for the purpose of his business and not as an investment for a period of not more than eight months prior to his death" (Section 2 of Chapter 700 of Laws of 1917).

With respect to the investments here involved, Charles W. Watson, the decedent, did not pay the permissive Stamp Tax under Article 15, neither were the investments assessed locally under Article 1. Accordingly the investments came within the terms of Article 10, Section 221-b, and, under the decision of the New York Court of Appeals affirming the constitutionality of that section, the transfer of the investments is subject to the additional tax thereby imposed.

By his will the deceased bequeathed $50,000 to his wife, giving her an option to take the equivalent thereof in the form of such securities left by him as she might elect. He made various further general bequests to relatives and non-relatives, and left the residue in trust for the life of his wife, with bequests of the principal upon the death of his wife (Transcript, pages 32-35).

Specification of Errors.

It is not disputed that $59,284.54 in value of investments left by the deceased came within the language of Section 221-b. The controversy arises from the contention of the plaintiffs in error that Section 221-b is unconstitutional and denies, to them and to the parties interested, the equal protection of the law and deprives them of property without due process of law (Assignment of errors, page 59).

Synopsis of Argument.

We shall consider the constitutionality of Section 221-b regarded (1) as imposing a succession tax, (2) as imposing an estate tax, and (3) as constituting a regulation of transfers rather than a tax. We think the section must be regarded as imposing a succession tax; and this will perhaps be conceded. We think that the unconstitutionality of the section is to be derived from principles of law sufficiently broad to apply whichever of the constructions above indicated may be deemed correct. Nevertheless arguments have

been advanced in support of the constitutionality of the section which seem to us to be unsound and misleading because of their failure to observe the precise nature of the tax imposed. Accordingly we believe it will aid in clarity of discussion to consider the constitutionality of the section with a due regard to the precise nature of the tax or charge imposed.

In this argument we confine the term *succession tax* to its strict meaning as a tax upon the exercise of the right to receive, chargeable against particular transferees. We use the term *estate tax* as referring to a tax upon the exercise of the right to transfer, chargeable against the estate as a unit.

Ordinarily of course a determination as to a tax, since it involves a determination of the persons chargeable therewith, would fix the tax either as a succession tax or as an estate tax. In the present case, however, the deceased directed that all legacies should be "paid free from legacy duty or tax" (Transcript, page 34), and accordingly the burden of the tax in effect falls upon the residuary estate whether the tax be deemed a succession tax or an estate tax.

ARGUMENT.

I. Section 221-b must be construed as imposing a succession tax, and so construed is unconstitutional and violates the Fourteenth Amendment to the Federal Constitution 8

A. Section 221-b must be construed as a succession tax 8

1. Article 10 of the Tax Law, in which Section 221-b is inserted, imposes a succession and not an estate tax.... 9

2. Section 221-b, like Article 10 in general, imposes a succession tax..... 9

3. The New York Court of Appeals construes Section 221-b as imposing a succession tax 13

B. Section 221-b regarded as a succession tax is unconstitutional..... 15

1. The classification set forth in Section 221-b has no reasonable or just relation to the transfers which the section purports to tax, and the law is therefore unconstitutional 16

2. Section 221-b in substance, by its necessary operation and manifest design, is framed to accomplish a result which is beyond the constitutional power of the Legislature; and cannot be cured by the selection of words which merely color the law as an exercise of a recognized power to tax transfers 24

II. Section 221-b, if construed as imposing an estate tax, is unconstitutional and violates the Fourteenth Amendment to the Federal Constitution 32

III. Section 221-b, if construed as a regulation of transfers rather than a tax, is unconstitutional and violates the Fourteenth Amendment to the Federal Constitution.. 34

A. Whatever may be the power of the state with respect to regulation of transfers, section 221-b is not a regulation of transfers, but a tax, pure and simple.. 35

B. However broad may be the power of the state with respect to regulation of transfers, and assuming that Section 221-b may properly be considered as an exercise of that power, that power is limited by the Fourteenth Amendment, and is here exercised in violation of that amendment 37

1. Regarded as a regulation of transfers, section 221-b has the negative defect of resting on a classification which has no reasonable or just relation to transfers or to the regulation of transfers, and is therefore unconstitutional 37

2. Regarded as a regulation of transfers, section 221-b is affected with the positive vice of resting upon a classification which is by its necessary operation and substantial purpose designed to accomplish a result which has no proper relation to the regulation of transfers, which result in its substance is unconstitutional 39

POINT I.

SECTION 221-B MUST BE CONSTRUED AS IMPOSING A SUCCESSION TAX, AND SO CONSTRUED IS UNCONSTITUTIONAL AND VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A. Section 221-b must be construed as a succession tax.

Before considering the constitutionality of Section 221-b we consider the nature of the tax imposed. A tax law may be analyzed with respect to its basis, rate and burden. In imposing a tax the legislature looks to some *basis* for the levying of the tax whether it be the individual as in the case of a poll tax, or property or franchises or transfers or income; it fixes a *rate;* and determines where the *burden* shall fall.

Section 221-b *purports* to look to transfers of investments at death as the basis of the tax; it fixes a flat rate of 5% based on value, except that certain exemptions are allowed; it places the burden on the recipients of such property, whether they receive by testamentary disposition or intestate law. The tax is therefore a tax upon the exercise of the right to receive rather than a tax upon the exercise of the right to transfer; it is a succession tax rather than an estate tax; its burden falls upon the respective transferees rather than on the estate as a unit.

We recognize that the construction placed upon this section by the New York Court of Appeals

will be deemed final by this court. We think the New York Court of Appeals has construed the section as imposing a succession tax rather than an estate tax, but since the language and the conclusions of that court may perhaps be deemed lacking in precise discrimination in this respect, we briefly present the argument that Article 10, of which Section 221-b is a part, imposes a succession tax; that Section 221-b by its language and by its intimate relations with the general provisions of Article 10 is clearly established as being also a succession tax; and that the highest Court of New York has so construed it.

1. *Article* 10 *of the Tax Law, in which Section* 221-*b is inserted, imposes a succession and not an estate tax.*

The statute of "Taxable Transfers" of which Section 221-b was made a part, imposes a tax on the exercise of the right to receive, the burden falling upon the respective transferees. This is manifest from the language of the statute, and the courts of New York have repeatedly and uniformly so held. This will not be disputed.

Matter of Sherman, 153 N. Y. 1.
Matter of Gihon, 169 N. Y. 443.
Matter of Penfold, 216 N. Y. 163.

See also

Matter of Hamlin, 226 N. Y. 407, 415.

2. *Section* 221-*b, like Article* 10 *in general, imposes a succession tax.*

Section 221-b, like the entire Article 10 of which it is a part, clearly imposes a tax upon the

exercise of the right to receive. We call attention to the following language of Section 2 of Chapter 700 of the Laws of 1917. A former Section 221-b is renumbered and there is

> "a new section two hundred and twenty-one-b inserted to read as follows;
>
> Additional tax on investments in certain cases. Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed in addition to the tax imposed by section two hundred and twenty-one-a, * * *."

The words "this article" refer to Article 10, "Taxable Transfers," as the New York Court of Appeals has held in the present case (Transcript, page 73). Article 10 embraces sections 220 to 245 inclusive of the Tax Law. A reading of Article 10 shows that Section 221-b, as an integral part thereof, imposes likewise a succession tax as opposed to an estate tax. It will be sufficient to refer to a few of the provisions of the Article.

Section 220 sets forth the basis or source of the ordinary transfer tax:

> "A tax shall be and is hereby imposed upon the transfer of any tangible property within the State and of intangible property * * * to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:
>
> "1. When the transfer is by will or by the intestate laws of this State of any intangible property, or of tangible property within the State, from any person being seized or possessed thereof while a resident of the State."

Section 243 obviates any confusion with estate ' ..es by definition of the words "estate," "property" and "transfer."

> "The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein passing or transferred to * * * [transferees] * * *, and not as the property or interest therein of the decedent * * *. The word 'transfer,' as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed."

Incorporating in the definition of "transfer" the preceding definition of "property," a "transfer" as used in Article 10 is the passing of particular portions of property to the respective transferees, and not the passing in general of the decedent's property; and accordingly taxable transfers are the separate transfers to transferees the burden of which falls upon the transferees, and not the general transfer, a tax upon which would fall upon the estate as a unit regardless of the transferees.

To carry out this scheme of taxation it was necessary to provide for the apportionment of a tax where the decedent did not apportion his property by specific bequests. Accordingly paragraph 3 of Section 220 provides:

> "Whenever the property of a resident decedent, * * * transferred by will is not specifically bequeathed or devised, such property

shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will."

Section 221 exempts transfers to certain charities and the like and exempts transfers to father, mother, husband, wife, widow or child up to $5,000 in value.

Section 221-a fixes the rates of the ordinary transfer taxes, providing that "upon all transfers taxable under this article" certain rates shall be applied varying with the closeness of the relationship of the transferee to the decedent and with the amount passing to the particular transferee.

Section 221-b is then "inserted," and it will be observed that it follows the phraseology of the ordinary transfer tax. Entitled *"Additional* tax on investments in certain cases," it provides that *"upon every transfer* of an investment as defined in article fifteenth of this chapter, *taxable under this article,* a tax is hereby imposed, in *addition* to the tax imposed by section two hundred and twenty-one-a, of five per centum * * * ".

The transfers "taxable under this article," as already pointed out, are the separate transfers to particular transferees, and not the transfer of the decedent's estate as a whole. The preceding sections of the article impose the usual transfer tax on such investments under the heading of intangible property, payable by or on behalf of the particular transferee. The tax payable by or on behalf of the estate as a unit would not be de-

scribed as *additional* to a particular tax payable by or on behalf of a particular transferee.

Other provisions of Article 10 provide the method of collection, establish liens, fix a period of limitation and the like, and it is beyond question that Section 221-b, as a part of Article 10, is intended to be and is expresesly subjected to these general provisions. To select a further instance, Section 224 provides that taxes under the Article shall be "a lien upon the property transferred until paid and the *person to whom the property is so transferred,* and the executors, administrators and trustees of every estate so transferred [note the definition of "estate" above given] shall be personally liable for such tax until its payment"; and further that "if such legacy or property be not in money, he [executor, administrator or trustee] shall collect the tax thereon upon the appraised value thereof *from the person entitled thereto.*"

3. *The New York Court of Appeals construes Section 221-b as imposing a succession tax.*

In view of the clear intent of the statute we assume that this Court will regard Section 221-b as imposing a succession tax and not an estate tax, unless the language of the New York Court of Appeals is unmistakably clear to the contrary. No such language can be found. The Court of Appeals in the present case did not specifically consider the distinction between succession and estate taxes; but we think the opinion as a matter of course accepts Section 221-b as imposing a suc-

cession tax. The opinion calls attention to the fact that Article 10 imposes an "inheritance tax," to which tax the tax under Section 221-b is "additional" and based on "investments passing by will or distribution" (Transcript, page 68); it contains a quotation from *Magoun* v. *Illinois Trust and Savings Bank* as to "the right to *take* property by devise or descent" (Transcript, page 70); it appears to assume at one point in the argument that a particular transferee or legatee may bear the burden of the tax (Transcript, page 72); it holds that the exemption allowed to certain relatives under Section 221 do not apply to Section 221-b (Transcript, page 73), but this is obviously based on a narrow construction of language and not on any distinction so far-reaching as would be involved in holding that Section 221-b imposes an estate tax and was therefore fundamentally different from the general succession tax of Article 10. Furthermore, the Court of Appeals in re *Washbourne's Estate,* Advance Sheets, 229 N. Y. (affirming 190 App. Div. 140; affirming 180 N. Y. Supp. 507) has reversed its position as to the application to Section 221-b of the exemptions of Section 221, and, in holding that the $5,000 exemption of Section 221 in favor of the widow and child of a decedent applied to the tax under Section 221-b, it would seem that the Court of Appeals has conclusively recognized that Section 221-b imposes a succession tax the burden of which falls upon particular transferees, and not an estate tax the burden of which would fall upon the estate as a unit.

B. Section 221-b regarded as a succession tax is unconstitutional.

In dealing with the considerations and principles which clearly reveal the unconstitutionality of this tax, we think it will appear that the arguments advanced in support of the tax, including those contained in the opinion of the Court of Appeals, while presenting various propositions of more or less merit, have failed even to touch directly upon the vital issue in the case.

The unconstitutionality of Section 221-b is to be derived from one fact and two principles of law.

THE FACT. As above stated, Section 221-b purports to look to transfers as the basis for the imposition of a tax, fixes a rate, and places the burden severally upon the transferees. *It purports* to look to transfers as the basis for the tax; *in fact,* it looks to something quite different as a basis, and the actual basis has no connection with transfers whatsoevere. Once this distortion, inherent in the statute, is clearly recognized, the conclusion that the statute is unconstitutional is inescapable. Viewed with respect to the burden of the tax and the time when it attaches the tax is apparently a transfer tax, or more particularly a succession tax. Viewed with respect to the basis of the tax, it is not a transfer tax, but a personal property tax or a penalty imposed on account of delinquencies of the decedent. Viewed as a whole, it is a mongrel tax, the inherent deformity of which leads inevitably to the conclusion

that the statute is unconstitutional and violates the Fourteenth Amendment.

The unconstitutionality of the statute follows from two unquestioned principles of constitutional law.

THE FIRST PRINCIPLE OF LAW. While the Fourteenth Amendment does not deprive the states of the power of classification, classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

THE SECOND PRINCIPLE OF LAW. A law which in substance, by its necessary operation and manifest design, is beyond the constitutional power of the legislature, cannot be cured by the selection of words which merely color the law as an exercise of some recognized constitutional power.

We propose to show that Section 221-b violates each of the above principles; in short, that it has what may be called the negative defect of resting upon a classification which has no reasonable or just relation to the transfers which it purports to tax; and has the positive vice of resting upon a classification which is designed to accomplish a result the unconstitutionality of which would be patent if it were not for the thin disguise as transfer tax legislation.

1. ***The classification set forth in Section 221-b has no reasonable or just relation to the transfers which the section purports to tax, and the law is therefore unconstitutional.***

To what does Section 221-b look as the basis of the tax imposed? The answer to this question is clear upon the face of the section; it is clearly stated in detail in the introductory portion of the opinion of the Court of Appeals quoted below.

Prior to its enactment there were two statutory provisions affording two methods of assessment and taxation applicable to investments of the kind here involved. These provisions related to personal property taxation, and to transfer taxation. The first was Article 15 of the Tax Law, constituting the "Tax on Investments." By this article the owner of such investments was given an option to pay to the state a tax of seventy-five cents per hundred dollars upon the face value of such investments and be exempted from any other local or state taxes. If he did not choose to pay this tax, he was then to be assessed on the full value of his pesonal property, including such investments, in the tax district where he resided, allowance being made for his debts.

We quote from the opinion of the Court of Appeals, in referring to this situation (Transcript, pages 67-68):

> "Under this system of assessment and taxation certain well-known facts and conditions existed regarding taxation upon personal property which must have been in the mind of the legislature at the time of the above enactment. A man was not compelled to tax himself or to present to the tax officers of his resident district a full and complete list of his securities. Assessments upon personal property or investments were thereupon made according to such meagre information as the assessors

could obtain or else according to appearance, reputation or surmise. It was also a well-known fact that in many local communities no attempt was made to assess personalty at its full value, as according to the tax rate it would have worked extreme hardship.

"Under the Laws of 1911, chapter 802, as thereafter amended, the tax provided by the state upon investments was permissive and not compulsory, the alternative being that if the bonds were not submitted in accordance with the methods provided by that law they were subject to an assessment by the locality as before stated.

"Under these conditions it was a matter of common knowledge that some owners submitted all or part of their bonded investments to the state tax, others paid upon a limited local assessment, and others not at all, and that a very large part of this kind of property went untaxed altogether.

"Such were the facts as developed in this estate of Charles W. Watson, deceased, which is typical and not exceptional. * * *

"This kind of property, therefore, divided itself into three classes, or if we prefer, varied in three different ways under the operation of the Tax Law, by reason of circumstances and conditions. Some of the investments yielded to local assessment, others submitted to the state tax and still a large part yielded no tax.

"These facts were before the legislature when they sought to reach this untaxed property in the methods devised by section 221-b of the Tax Law. Article X of that law had already established an inheritance tax varying in amount according to the degrees of relationship of the transferee. To this was

> added, by section 221-b, an additional tax of 5% upon those investments passing by will or distribution which had not been assessed locally or paid the state stamp tax."

Chapter 700 of the Laws of 1917 is entitled "An Act to Amend the Tax Law, in Relation to the Tax on Investments and Transfers." By its first section it amends Article 15 ("Tax on Investments"), and by its second section it inserts Section 221-b in Article 10 ("Taxable Transfers"). Article 15, as thus amended, provides solely for a tax on investments as there defined, and does not relate to transfers at death. It provides in substance that "any person may take or send to the office of the comptroller of this state any investment, and may pay to the state a tax at the rate of twenty cents per year on each one hundred dollars or fraction thereof of the face value of such investment for one or more years * * *"; that the comptroller thereupon shall affix stamps to the investment so submitted; that such investments shall thereafter be exempt from local assessment and other taxes [with exceptions not here involved]; and that (Section 336):

> "The owner of any investment, on which the tax provided for in this article has not been paid, shall be assessed upon such investment in the taxing district in which he resides, upon the fair market value of such investment, and no deduction for the just debts owing by him shall be allowed against the assessed value of such investment, as provided in section six of this chapter or else-

where in this chapter or in any other law of this state except that the deduction from the taxable property permitted by section six of this chapter shall be allowed to any person, in respect of any investment which for the purpose of his business, as hereinafter described and not for or as an investment, shall be temporarily owned and held for sale by such person then actually engaged in the bona fide purchase and sale of such investment as a business, and who then shall have and maintain an office or place of business in this state for the carrying on of the actual bona fide business of purchasing and selling such investments as distinguished from the purchase thereof for investment, but such deduction shall not be allowed in respect of investments owned and held for a longer period than eight months."

By its second section, as already noted, this same chapter of the Laws of 1917 inserts Section 221-b as a new section in Article 10, that is, in the statute law of "Taxable Transfers," constituting the New York succession tax law.

We think that the above quotation from the opinion of the Court of Appeals is a confession, however unintentional, that Section 221-b does not look to transfers as a *basis* for the tax imposed. Chapter 700 of the Laws of 1917 confirms the conclusion, which indeed is manifest upon the face of Section 221-b, that the section does not look to transfers as the basis for the imposition of a tax. It looks to facts antedating the transfer, which facts have nothing to do with the *kind* of property or investments, but merely an indirect historical *relation* to certain investments. It looks

to the fact that certain investments, though subject to local assessment, were not in fact assessed. It looks to the delinquency of the deceased with respect to certain investments and seeks to impose a penalty under the guise of a transfer tax; or it looks to the investments as being personal property which escaped assessment, and seeks to recover a personal property tax under the guise of a transfer tax. In this connection it will be noted that Section 221-b exempts investments held by a decedent for not more than eight months in connection with the business of purchasing and selling investments. Manifestly, this exemption is not designed as having any relation, reasonable or otherwise to the right to receive by descent or distribution, but is intended to parallel the special privilege under personal property taxation given to those who hold investments for not more than eight months in connection with the business of purchasing and selling investments (Section 336, above quoted). In short the purpose of Section 221-b is to enforce the personal property tax on investments provided for in Articles 1 and 15 of the Tax Law.

Whatever relevancy the classification of Section 221-b may have to personal delinquencies with respect to personal property taxes, and whatever relevancy the classification may have with respect to investments which have not been assessed as a basis for personal property taxation, the classification clearly has no reasonable or just relation to transfers at death. Whether or not the classification is arbitrary with respect to penalties or to personal property taxation, it must stand or

fall as a classification of transfers. As a classification for transfer tax purposes it is arbitrary, unreasonable and unjust, because it is not founded on any general discrimination between transfers, or between kinds of property transferred, or between relationships or other characteristics of transferees. To find any reasonable explanation of the tax, and indeed even to state the tax, it is necessary to look beyond all of the incidents of transfers and to revert to history antedating the death of the decedent.

By way of analogy, suppose that a New York statute in imposing a "toll" upon all vehicles or goods crossing the Brooklyn Bridge, enacted that "upon every transfer of foodstuffs over Brooklyn bridge, a toll is hereby imposed of five per centum of the appraised inventory value of such foodstuffs in every case where the owner of such foodstuffs shall, before such transfer, have violated with impunity the New York Pure Food Law with respect to such foodstuffs;" or suppose that the toll were 5% of the value of every vehicle which had theretofore violated the municipal regulations as to speed and escaped fine; or 5% of the value of every vehicle which had escaped some previous annual road tax imposed on all vehicles. Obviously, such classifications would have no reasonable relation to the privilege of transfer over Brooklyn bridge. As classifications for toll purposes, they would be wholly arbitrary, and in violation of the Fourteenth Amendment.

Incongruous as would be the provisions of such toll statutes, the provisions of section 221-b are equally incongruous and insupportable. The

stamp tax and the personal property tax and the personal delinquencies of the decedent are as foreign to transfers at death, as are general speed regulations and annual road taxes and pure food laws to transfers over Brooklyn bridge.

The principle that the Fourteenth Amendment forbids arbitrary classifications has been frequently asserted by this Court.

> *Bell's' Gap Rd.* v. *Pennsylvania,* 134 U. S. 232.
> *Gulf, Colo. & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150.
> *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79.
> *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540.
> *Peo. ex rel. Farrington* v. *Mensching,* 187 N .Y. 8.

Instances of reasonable and just classifications with respect to transfers are familiar. There may be classifications with respect to the kind of property transferred, or the amount or value of property transferred, or the relationship of transferees to the deceased, or the character of transferees as engaged in charities or educational work or the like.

The classification here attempted is a colorable and not a genuine classification of kinds of property. Viewed as a tax on transfers it is arbitrary and founded on no reasonable or just relation to the transfers which are taxed.

> *Magoun* v. *Ill. Trust & Savings Bank,* 170 U. S. 283.

Campbell v. *California*, 200 U. S. 87.
Matter of Pell, 171 N. Y. 48.

In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351, this Court intimated that a tax classification might rest upon the "condition" of property, but it is obvious that the fact that investments at some past time were not assessed and the owner therefore paid no tax based on such ownership is no part of the "condition" of the investments at the owner's death.

Under the principle of the above cases it would seem clear that Section 221-b denies the equal protection of the laws.

Furthermore, since the true basis of the tax is the delinquency of the deceased, it deprives the transferee of the investments of property without due process of law for the obvious reason that the penalty under whatever name it be disguised is placed upon the transferee and not upon the delinquent. However regular the transfer tax procedure may be otherwise, it furnishes the transferee no opportunity to disprove his own liability for the delinquency; his liability is by the statute declared irrelevant.

2. *Section 221-b in substance, by its necessary operation and manifest design, is framed to accomplish a result which is beyond the constitutional power of the Legislature; and cannot be cured by the selection of words which merely color the law as an exercise of a recognized power to tax transfers.*

We have heretofore considered the classification in Section 221-b primarily with respect to the

question whether it has any reasonable relation to transfers, and we think the inescapable conclusion is that it has no such relation. We now consider the classification from a somewhat different standpoint. While the classification may be arbitrary for various other reasons, its arbitrariness may be due to the fact that the classification is wholly pointless and purposeless, and accordingly without any reasonable or just relation to transfers or to any other conceivable subject. The defect in that case is in a sense a negative defect. We have attempted to show that Section 221-b has this negative defect at least so far as transfers are concerned. We propose now to show that it constitutes a positive and a more vicious offense against the Fourteenth Amendment.

The classification in Section 221-b is not pointless and purposeless. It is inexplicable and pointless as a classification of transfers, but its true purpose is an ulterior purpose. Worded as a transfer tax and imposing its burden after the manner of transfer taxes, its purpose nevertheless is not to tax transfers, but to make a belated collection on account of past delinquencies of the deceased, or on account of possible assessments for personal property taxation, which assessments, however, were never made.

Reverting to the supposititious tolls for passing over Brooklyn bridge, it is clear that the *motive* of such statutes would be, not the exaction of a toll, but the enforcement of the pure food law or the speed regulations or the annual road tax; and the *specific object* would be an unequal and casual enforcement of those laws and regulations,—unequal

and casual because depending on the wholly irrelevant circumstance of a subsequent passage over Brooklyn bridge.

Similarly, however worthy may have been the motive of the Legislature in enacting Section 221-b, the specific object of that statute was an unequal and casual imposition of a penalty, or an unequal and casual enforcement of personal property taxes,—unequal and casual because depending on the wholly irrelevant circumstance of a subsequent transfer at death.

Thus Section 221-b seeks by indirection to accomplish an unconstitutional result. Throwing aside the transfer tax disguise, we consider the tax first as a penalty, and second as a personal property tax.

(a) *As a penalty.* The option of the decedent to pay a stamp tax on his investments may be ignored since the stamp tax was permissive and not compulsory. Not having paid the stamp tax, however, the law provided that the investments should be assessed locally as a basis for fixing the personal property tax against the decedent. There was no provision requiring him to list his property, and it does not appear that he made any mis-statements as to property owned by him. He paid his personal property tax upon the assessments actually made (Transcript, pp. 24-25, 29-32). No debt accrued with respect to property not assessed. Having paid his tax as assessed, no lien attached as to these investmeots or as to any other property owned by him, whether assessed

or not. The law contains no provision for rectifying the omission of the assessors, except that property overlooked upon one assessment might be assessed on, and only on, the succeeding assessment, which was not done in this case. At the most, the deceased was delinquent, the delinquency entailing no penalty.

Dixon v. *Jersey City*, 37 N. J. L. 42.

The delinquencies of the deceased accrued wholly or in part before the enactment of Section 221-b, so that a penalty could not constitutionally have been imposed. But assuming that it could have been imposed, and regarding Section 221-b as imposing such a penalty, its constitutional defects are too obvious for argument. No penalty is imposed in the case of a delinquent so long as he lives. If the delinquent transfers the investments *inter vivos* no penalty is imposed, but if the transfer takes place at his death the penalty is imposed. It is not imposed upon the delinquent, but on innocent transferees. If the transferee is a widow who pays no transfer tax under the normal transfer tax provisions no penalty is imposed. That such a statute, regarded as a penalty statute, violates both the equal protection and due process clauses of the Fourteenth Amendment is obvious. Yet this is the result which Section 221-b, in reality attempts to accomplish, and to divest it of its patent unconstitutionality as a penal statute, it is clothed in the garb of a transfer tax.

(b) *As a personal property tax.* If the true and inherent purpose of Section 221-b is not to

impose a penalty, it is, as the only alternative, designed to impose a personal property tax. While sustaining Section 221-b as imposing a transfer tax, we think that the Court of Appeals, inadvertently perhaps, has recognized that the real purpose of the section is to impose a personal property tax. That Court said (Transcript, page 72):

> "Is there not, at least, a semblance of reason in *seeking to tax* upon inheritance *property* which has not been taxed locally or for state purposes, when such fact can only be discovered upon the death of the owner? * * * It has in it at least an effort for the equalization of taxation and the adjustment of the burdens of government."

Viewed as imposing a personal property tax, Section 221-b would manifestly be unconstitutional. It would violate the requirement of equality and uniformity in taxation, and would violate the Fourteenth Amendment of the Federal Constitution. It would be superfluous to reiterate the peculiar provisions of this tax which would render it unconstitutional as a personal property tax.

An attempt to support Section 221-b as imposing either a penalty or a personal property tax would be little short of absurd. No such attempt has been made by the courts. In spite of the above quotation, the New York Court of Appeals has clearly construed the section as a transfer tax statute, and we assume that this court will not concern itself directly with any other conceivable construction. Accordingly, we do not consider the constitutionality of Section 221-b, regarded

as a penal statute or a personal property statute, as a matter directly in issue. The significant point is that an unconstitutional penalty or an unconstitutional personal property tax represents the specific and substantial purpose inherent in Section 221-b. However broad may be the power of the state with respect to transfer taxation, that power is not sufficiently broad to support a colorable classification of transfers which in reality and in substance is designed to accomplish an unconstitutional result quite beyond the scope of transfer tax legislation.

Before citing cases upon this point, a reference to the case of *Beers* v. *Glynn*, 211 U. S. 477, will perhaps be illuminating as showing the distinction between the mere question of arbitrariness in classification and the question now considered as to classifications which may, or may not, be arbitrary with respect to their proper subject matter, but have a clear design to accomplish some ulterior and unconstitutional purpose not propeerly related to the apparent subject matter of the statute.

The case of *Beers* v. *Glynn* is the strongest case cited in support of the constitutionality of Section 221-b. In that case the New York Inheritance Tax imposed a Transfer Tax on the transfer of personalty of a non-resident decedent who owned realty in the State of New York at the time of his death, but failed to provide for the taxation of personalty of a non-resident decedent who did not own realty in the State of New York. This Court said (p. 484):

> "But though the operation of the statutes creates a difference, this even if intentional is not of itself sufficient to invalidate the tax. The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method."

But there is a profound distinction between the present case and the *Beers* case. We think the statute in the *Beers* case went to the verge of permissible peculiarities of classification, and falls little short of being arbitrary. But it is clear that the basis of the tax in the *Beers* case was *transfers*. It cannot be said with any show of reason that the tax was in substance a penalty for holding real estate. However unwise or even foolish the statute may be, it was not framed with a covert design to accomplish some purpose other than the taxation of transfers. To fix the tax it was not necessary to look beyond the transfer. A transfer of personalty accompanied by a transfer of realty was taxed, while a transfer of personalty unaccompanied by a transfer of realty was not taxed.

In the present case, unlike the *Beers* case, the statute is not merely arbitrary with respect to transfers; it has a very clear design, unconstitutional in substance, and not less unconstitutional because colored as a transfer tax. Its real purpose is to exact a penalty, clearly unconstitutional when stated as a penalty, or to exact a personal property tax, clearly unconstitutional as such.

It is perhaps superfluous to cite cases to the effect that the Fourteenth Amendment cannot be defeated by the mere choice of language; but we refer to the following cases:

Looney v. *Crane Co.*, 245 U. S. 178.
Postal Telegraph Cable Co. v. *Adams*, 155 U. S. 688.
International Paper Co. v. *Mass.*, 246 U. S. 135.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.
State ex rel. Trustees v. *Township, etc.*, 36 N. J. L. 66.
See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147-152.

Fundamentally, the principle here invoked is the principle applied in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207, in which the court said of a Texas statute:

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, *to surrender a right and privilege secured to it by the Constitution and Laws of the United States, was unconstitutional and void* * * * ". (Quoted in *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 36.)

In *Maxwell* v. *Bugbee*, 250 U. S. 525, it was held that a State might refer to foreign property as a measure of a tax, provided the measure was not so applied as to amount to a tax on such foreign property. It was recognized that

"where a State exceeds its authority in imposing a tax upon a subject matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void" (pp. 539-540).

POINT II.

SECTION 221-B, IF CONSTRUED AS IMPOSING AN ESTATE TAX, IS UNCONSTITUTIONAL AND VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

As already stated, we think Section 221-b imposes a succession tax rather than an estate tax, a tax on the exercise of the right to receive rather than on the exercise of the right to transfer; and the section is here considered as imposing an estate tax only for the reason that the opinion of the New York Court of Appeals may not be deemed clear upon this point, and because some of the arguments there advanced may seem to presuppose an estate tax.

As imposing an estate tax the section is unconstitutional for substantially the same reasons considered under Point I. Superficially regarded it may seem that in collecting from the delinquent's estate a penalty for his delinquency there is a measure of justice which is lacking where the penalty is imposed upon particular transferees; or, similarly, it may seem that, in taxing the estate because it includes property which was not

assessed against the deceased in some personal property assessment, there is a measure of justice which is lacking where, virtually, the personal property tax is charged against a particular transferee.

The distinction, however, is superficial. An estate tax is not a tax upon the property of the estate. It is a tax upon the exercise of the right to transfer, and, like transfer taxes in general, is based on the transfer and not on the property transferred.

> *United States* v. *Perkins*, 163 U. S. 625.
> *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283.
> *Knowlton* v. *Moore*, 178 U. S. 41.
> *Matter of White*, 208 N. Y. 64.
> *Matter of Penfold*, 216 N. Y. 163.

Viewed as an estate tax it still remains true that the tax merely *purports* to be based on transfers, and in reality is based on the delinquency of the decedent or on the fact that the investments at some previous time escaped assessment for personal property taxation, facts which have no reasonable or just relation to transfers at death.

As an estate tax, the classification in section 221-b not only has the negative defect of having no reasonable or just relation to transfers, but it likewise has the positive vice of attempting to impose an unconstitutional penalty or personal property tax in the guise of a classification of transfers.

POINT III.

SECTION 221-B, IF CONSTRUED AS A REGULATION OF TRANSFERS RATHER THAN A TAX, IS UNCONSTITUTIONAL AND VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The argument is frequently advanced in support of transfer tax laws, and there is language in the opinion of the Court of Appeals in this case to the effect that the state has some peculiar freedom with respect to transfer taxation, based on the principal that the right to transfer at death is not a natural or inherent right, but is a right granted by the state, and hence subject to the broad power of the state to regulate transfers, and subject to the right of the state to withhold, in part or wholly, any or all property from passing at death. The theory is that while the state may be under special constitutional restrictions with respect to taxation, it is in some vaguely defined measure free from those restrictions in exercising its power to withhold property from passing at death or regulating transfers at death. This theory, no doubt correct when properly limited, has been applied to the extent of arguing that the state has an unlimited power with respect to transfer taxation, and that, since transferees take only by the grace of state legislation which waives in part the right of the state to the property transferred, prospective transferees, having

no right to receive anything, cannot complain because they have not received more than they have received in fact.

So far as the present case is concerned there are two answers to this line of argument.

A. Whatever may be the power of the state with respect to regulation of transfers, Section 221-b is not a regulation of transfers, but a tax, pure and simple.

The Decedent Estate Law of New York constitutes the complete regulation of transfers by the state of New York. With exceptions not material in the present case, the right to transfer and to receive at death real and personal property is expressly given, and without restrictions. Sections 10, 11, 12 and 15 of the Decedent Estate Law read as follows:

> "§10. Who may devise. All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article.
>
> "§11. What real property may be devised. Every estate and interest in real property descendible to heirs, may be so devised.
>
> "§12. Who may take real property by devise. Such a devise of real property may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise. * * *

> "§15. Who may make wills of personal estate. Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing."

Of course the right is subject to tax, and the law is subject to repeal or amendment. It is, however, inconceivable that the Court of Appeals would deem section 221-b to be an amendment or partial repeal of the Decedent Estate Law. Certainly no such doctrine is stated. We think the argument of the Court of Appeals here referred to is inapplicable except upon the supposition that section 221-b is a regulation of transfers and as such an amendment of the Decedent's Estate Law. In the absence however of any such direct construction by the Court of Appeals we do not believe this Court under the rule that it will accept the state construction of state statutes, will mould a statute so that it will constitute a fitting background for the general theories advanced by a state court.

This tax is no more a regulation of transfers than was the case in *Knowlton* v. *Moore, supra.* Even though the State may have a greater power than Congress in respect to inheritances, its power of regulation was not here exercised.

See statement of Mr. Justice Brewer in the *Magoun* case *supra,* at p. 303.

B. However broad may be the power of the State with respect to regulation of transfers, and assuming that Section 221-b may properly be considered as an exercise of that power, that power is limited by the Fourteenth Amendment, and is here exercised in violation of that Amendment.

1. *Regarded as a regulation of transfers, section 221-b has the negative defect of resting on a classification which has no reasonable or just relation to transfers or to the regulation of transfers, and is therefore unconstitutional.*

No court, we believe, has gone so far as to assert that the power of the state with respect to the regulation of transfers at death is beyond the reach of the Federal Constitution. The theory is that the Fourteenth Amendment is inapplicable, that the state may withhold all property from transfer, that the prospective transferee accordingly has no rights of which he is in a position to be deprived, that he takes only what the state releases and cannot found any claim to the balance withheld since he has and never had any right thereto. Thus the Court of Appeals said in this case (Transcript, p. 72):

> "The objection cannot be pressed, that the beneficiary under the will is punished for the misdeeds of the ancestor in not paying a local or state tax. The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left

> after the tax is paid. The state, therefore, having the power to place an inheritance tax upon property which has escaped taxation during the lifetime of the testator, it is no valid objection that the legatee may deem himself punished by the circumstance."

The argument would seem to be that even if the so-called inheritance tax is *in substance* a penalty for a delinquency of the deceased, the legatee, in accepting so much as the state allows to him by way of gratuity, has no possible claim because the state is not more liberal.

We are not here concerned with the fact that this statement of the Court of Appeals is in violent and irreconcilable conflict with the provisions of the statute which in section 224 specifically provides that the tax is a charge against the legatee, collectible from him, specific property being withheld only to enforce the lien imposed thereon on account of the charge against the legatee. But ignoring the plain language of the statute, and assuming that there is some statutory basis on which the Court of Appeals might properly predicate a discussion of the power of the state with respect to the regulation of transfers, we think the argument is essentially unsound. The equal protection of the laws is not to be confined to an equal protection with respect to rights already acquired. If the state creates and grants rights to individuals, the equal protection clause requires that the rights so granted be equal, or, in other words, based on some reasonable and pertinent classification. The Fourteenth Amendment requires that equal protection

be afforded in granting new rights as well as in protecting existing rights. If the state, as a regulation of transfers, grants certain rights to transfer and correlative rights to receive, such rights must be granted equally or according to some reasonable and relevant classification; otherwise the equal protection of the laws is clearly denied to those who receive lesser rights.

Thus, in the *Magoun* case, *supra*, the Court said:

> "The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

2. *Regarded as a regulation of transfers, section 221-b is affected with the positive vice of resting upon a classification which is by its necessary operation and substantial purpose designed to accomplish a result which has no proper relation to the regulation of transfers, which result in its substance is unconstitutional.*

If it could be granted that the state in enacting transfer regulations could adopt classifications with practically no limitations with respect to arbitrariness or absence of reason in such classifications, it must still be true, if the Fourteenth Amendment is to be regarded as something more than a guide to statutory phraseology, that this alleged extraordinary power of the state with respect to transfers cannot be extended to other

subject matters by the mere device of classifications which are not genuine so far as transfers are concerned, but in substance are classifications of totally different subject matters as to which no such unrestricted power can be claimed to exist.

We have already shown that the real purpose inherent in section 221-b is not the taxation or regulation of transfers, but the imposition of a penalty or a personal property tax, and we have already cited cases asserting the fundamental principle here invoked. The regulation of transfers is subject to those principles equally with the taxation of transfers.

CONCLUSION.

It is respectfully submitted that the final order and decree herein should be reversed.

STETSON, JENNINGS & RUSSELL,
Attorneys for Plaintiffs-in-Error,
15 Broad Street,
New York City.

Wm. C. Cannon

EDWARD R. GREENE,
HAROLD W. BISSELL,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 260.

ANNA H. WATSON AND FREDERICK WATSON, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES W. WATSON, DECEASED,
Plaintiffs in Error

against

THE STATE COMPTROLLER OF THE STATE OF NEW YORK,
Defendant in Error.

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF OF DEFENDANT IN ERROR.

JOHN B. GLEASON,
Counsel for Defendant in Error,
233 Broadway,
New York City.

The Beekman Print Job Printing Office, Inc., 122 Fulton St., N. Y.

INDEX

	PAGE
ANALYSIS OF ARGUMENT	11
POINT I	11
The scheme of Art. XV is valid	11
Exemption of dealers is valid	13
Exemption of their estates in § 221*b* is valid	13
Operation of § 221*b* is equal	15
POINT II	17
Force of state court construction	17
POINT III	20
The class is definite	20-24
Is derivable by exemption	24
Different conditions require different taxes	24
Definition of *condition*	25
Inequality of burden	25
POINT IV	26
Louisiana Constitution has like class	26
Its principle is sanctioned in Plummer *v.* Coler	27
Relation to the State permits classification	27
The State may have a policy of taxation	28
The class here is general	28
To call this tax a penalty is error	30
Its effect is remedial not penal	30
Its incidental effect is also excellent	31
Reciprocal relation permits classification	32

PAGE

POINT V..... 32

The tax is a condition precedent..... 32
The State may thus regulate..... 32-36
Analogy of tolls considered..... 37
Police power analogy..... 37
Examples of like regulation..... 37-38
Public policy may require discrimination.. 37
Rule of show of reason discussed..... 37-41
Examples of classifications upheld..... 41-43
Examples of New York classes..... 43
Review of opposing arguments..... 44-46
This court has condemned like contentions.. 46
Claims of oppression attack only the measure of the tax..... 47

POINT VI..... 48

Objectors must show that no show of reason exists 48-52
The reasoning of the Court of Appeals shows good reasons..... 52

POINT VII..... 53

Authorities under the Fourteenth Amendment 53
Arbitrary 22, 49
Blood relationship 45

Brief of plaintiffs-in-error.

Exemptions 2
"basis of the classification"..... 23
"indirect historical relation"..... 23
Ill words about the tax..... 23
classification be condition..... 25
Vested rights of innocent transferees.. 36
Analogy of tolls..... 37
"unequal and casual"..... 38

PAGE

Apparent concession as to class..... 40
Relation to "transfer"..... 46
Criticism of the motives of the State.. 47
Claim of oppression..... 48

Classification.

Under § 221*b* 10, 20
By naming and exempting..... 24
By difference in condition..... 24
By Louisiana classification..... 26
By relation to the State..... 26, 38
By reciprocal relation..... 31
Is requisite 34
Discrimination between kinds 39
Show of reason..... 39
Common sense sees the differences.... 40
Rule in Magoun case..... 40
Discussion of 40
of "act in respect to which"..... 40
Examples of 40
Examples under N. Y. tax law..... 43
Opposing rule of blood, accident, transferability 43-44
When arbitrary 48-50
Dealers in investments 10
Exemption under § 336..... 13
Estates of dealers under § 221*b*..... 13
Deterrent effect of a tax.....19, 29, 32
Difference in condition..... 24
Diversity of taxation..... 25
Equal operation of the tax..... 15
Estate tax of Connecticut..... 21
Evil 29
Exemption of dealers under section 336.... 13

PAGE

Exemption in estates of dealers under section 221*b* 13
Fourteenth Amendment 53
Heritability 46
Incidental effect of this tax 31
Inequality of burden 25
Inheritance tax as a regulation 32

Investments 8

Louisiana Constitution 26
Oppression 47

Penalty.
State court construction that statute is not 19
It is incorrect to refer to this tax as a penalty 30-32
Distinction between penal and remedial statutes 30
Some call any good tax a penalty 32
Effect of calling this tax a penalty 32
Police power 37
Policy of taxation 28
Remedial statutes 30
Specific schemes of taxation 4, 11
Statement of facts 1
Tax law of New York 3-8
Taxation of transfers in this estate 3
Untaxed property in relation to the State .. 20
Classified for addition to assessment rolls 21
Classified for estate tax 21
Classified for Louisiana inheritance tax 26

CASES CITED.

	PAGE
Adams Express Co. *v.* Ohio, 165 U. S. 194..	49
American Sugar Ref. Co. *v.* La., 179 U. S. 89	15
Amoskeag Savings Bk. *v.* Purdy, 231 U. S. 373	11
Armour Packing Co. *v.* Lacy, 200 U. S. 226	49
Atchison, Topeka, &c. R. R. *v.* Matthews, 174 U. S. 96	26
Beers *v.* Glynn, 211 U. S. 477	42, 45
Bell's Gap R. R. *v.* Pennsylvania, 134 U. S. 232	11, 49, 53
Blackstone *v.* Miller, 188 U. S. 189.....	44
Board of Education *v.* Ill., 203 U. S. 553..	15, 27
Board of Liquidation *v.* Louisiana, 179 U. S. 622	18
Bradley *v.* Richmond, 227 U. S. 477, 480...	37
Brown Forman Co. *v.* Kentucky, 217 U. S. 563	20
Cahen *v.* Brewster, 203 U. S. 543	18, 27
Campbell *v.* California, 200 U. S. 87....18,	36, 46
Carpenter *v.* Pennsylvania, 17 How. 456...	17
Carroll *v.* Greenwich Ins. Co., 199 U. S. 401.	28, 55
Central Lumber Co. *v.* South Dakota, 226 U. S. 157	14, 28, 29, 54
Chanler *v.* Kelsey, 205 U. S. 466	18
Cheney Bros. *v.* Massachusetts, 246 U. S., 147	51
Citizens Natl. Bk. *v.* Vermont, 231 U. S. 120	15
Citizens Telephone Co. *v.* Fuller, 229 U. S., 322	47, 49, 55
Clement Natl. Bk. *v.* Vermont, 231 U. S. 120.	11, 49
Collins *v.* Texas, 223 U. S. 288.....	13
Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540	15, 23, 40, 42

PAGE

Cook *v.* Marshall Co. 196 U. S. 261, 273.... 14
Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292 18
County of Mobile *v.* Kimball, 102 U. S. 691 47

Davidson *v.* New Orleans, 96 U. S. 97..... 48
Dred Scott *v.* Sandford, 19 How. 393..... 18

Enterprise Irr. District *v.* Canal Co., 243 U. S. 157 18
Estate of McCahill, 171 Cal. 482..... 13
Express Co. *v.* Seibert, 142 U. S. 339..... 24

Farmers Bank *v.* Minn., 232 U. S. 516..... 15
Flint *v.* Stone Tracy Co., 220 U. S. 107.... 15, 48
Fort Smith Lumber Co. *v.* Arkansas, 251 U. S. 534 ..... 28, 38

Gallup *v.* Schmidt, 183 U. S. 300..... 21
Gast Realty Co. *v.* Schneider Granite Co., 240 U. S. 55 41
Green *v.* Frazier, 252 U. S..... 56
Grenada Lumber Co. *v.* Mississippi, 211 U. S. 433 19
Gulf Co. *v.* Hewes, 183 U. S. 66..... 18
Gulf Ry. Co. *v.* Texas, 204 U. S. 403..... 18
Gundling *v.* Chicago, 177 U. S. 183..... 37

Hatch *v.* Reardon, 204 U. S. 152..... 13, 43
Henderson Bridge Co. *v.* Henderson, 173 U. S. 592 53
Herron *v.* Keeran, 59 Ind. 472..... 13
Hodge *v.* Muscatine Co., 196 U. S. 276..... 19, 23
Hooker *v.* Burr, 194 U. S. 415..... 13
Hunting *v.* Attrill, 146 U. S. 657..... 31

International Harvester Co. *v.* Missouri, 234 U. S. 199 ..... 26, 49

PAGE

Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759 21

Kansas City R. R. Co. *v.* Stiles, 242 U. S. 111 51
Keeney *v.* New York, 222 U. S. 525..... 42
Keokee Coke Co. *v.* Taylor, 234 U. S. 224... 14, 28
Kollock, *in re* 165 U. S. 526 31
Knowlton *v.* Moore, 178 U. S. 41..... 35

Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61 ..... 28, 54

Mager *v.* Grima, 8 How. 490 33
McCray *v.* United States, 195 U. S. 27..... 48
Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283..15, 16, 25, 35, 36, 40, 41, 49, 53
Matter of Delano, 176 N. Y. 486..... 33
Matter of Otis, 103 Misc. 655 .....
Matter of Penfold, 216 N. Y. 163..... 33
Matter of Ramsdill, 190 N. Y. 492..... 16
Matter of Romaine, 127 N. Y. 80..... 13
Matter of Swift, 137 N. Y. 71..... 33
Matter of Washbourne, 180 N. Y. Supp. 507
Matter of White, 208 N. Y. 64..... 33
Maxwell *v.* Bugbee, 250 U. S. 525..... 17, 27, 42, 44, 56
Merchants Bank *v.* Pennsylvania, 167 U. S. 461 ..... 11, 25, 49, 53
Met. Street Ry. *v.* New York, 199 U. S. 1... 18
Michigan Central R. R. Co. *v.* Powers, 201 U. S. 245 ..... 49, 54
Middleton *v.* Texas Power & Light Co., 249 U. S. 152 56
Miller *v.* Strahl, 239 U. S. 426..... 15
Miller *v.* Wilson, 236 U. S. 373..... 55
Missouri, K. & T. R. R. Co. *v.* Code, 233 U. S. 642 30

PAGE

Mobile *v.* Kimball, 102 U. S. 691 47
Moffitt *v.* Kelly, 218 U. S. 400 18
Murphy Theatre Co. *v.* Chicago, 228 U. S. 61 49
Myers Salt Co. *v.* Iberia Drainage Dist., 239 U. S. 478 41

New York *v.* State Board of Tax Commissioners, 199 U. S. 37 47
Northwestern Life Ins. Co. *v.* Wisconsin, 247 U. S. 132..... 15, 52, 55

Old Colony Trust Co. *v.* Omaha, 230 U. S. 100 18
Orient Insurance Co. *v.* Daggs, 172 U. S. 557 ..... 41, 53
Otis *v.* Parker, 187 U. S. 606..... 29, 50
Ozan Lumber Co. *v.* Union Co. Bank, 207 U. S. 251 14

Pacific Express Co. *v.* Seibert, 142 U. S. 339 49
Palton *v.* Brady, 184 U. S. 608 48
Palsone *v.* Pennsylvania, 232 U. S. 138 28
Penfold *v.* Travis, 248 U. S. 537..... 47
People *v.* Griffith, 245 Ill. 532 13
Plummer *v.* Coler, 178 U. S. 115 ..... 27, 36
Preston *v.* Chicago, 226 U. S. 477..... 18
Pullman Co. *v.* Knott, 235 U. S. 23..... 28

Quong Wing *v.* Kirkendall, 223 U. S. 59.... 28

Roach *v.* Nevin, 128 U. S. 578 47
Rosenthal *v.* N. Y., 226 U. S. 260 ..... 1.

Snyder *v.* Bettman, 190 U. S. 249 36
Southern Ry. Co. *v.* Bush, 122 Ala. 470..... 31
Southern Ry. Co. *v.* Decker, 5 Ga. App. 21.. 31
Southern R. R. Co. *v.* Green, 216 U. S. 400.. 51
Southern Ry. Co. *v.* King, 217 U. S. 524.... 13

PAGE

Southwestern Oil Co. *v.* Texas, 217 U. S. 114 38
Standard Food Co. *v.* Wright, 225 U. S. 540 13
State of N. Y. *v.* Co. of Kings, 125 N. Y. 312 20
St. Louis Land Co. *v.* Kansas City, 241 U. S. 419 18
St. Louis Southwestern Ry. *v.* Arkansas, 235 U. S. 250 48

Tanner *v.* Little, 240 U. S. 369.....14, 37, 39
Turpin *v.* Lemon, 187 U. S. 51..... 51
Tyler *v.* The Judges, 179 U. S. 405 13

United States *v.* Perkins, 183 U. S. 625..... 34, 35

Wheeler *v.* Sohmer, 233 U. S. 434 44
Willoughby *v.* Chicago, 235 U. S. 45..... 18
Williams *v.* Eggleston, 170 U. S. 304..... 18

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 266.

WATSON EXECUTORS,
Plaintiffs in Error,

v.

THE STATE COMPTROLLER OF NEW YORK,
Defendant in Error.

IN ERROR TO THE SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF OF DEFENDANT IN ERROR.

Statement of Facts.

The plaintiffs in error as executors of Charles W. Watson, a resident of New York, deceased August 18, 1917, claim that they are deprived of the equal protection of the laws, by the taxation, under section 221-*b* of the New York tax law, of the transfer of the non tax paid bonds named *investments* in section 330 of the tax law, owned by the

decedent at his death and upon which he had omitted to pay any tax either under section 331 or 336 of the tax law. Since 1910 there has been a separate scheme in New York for the taxation of serial bonds, first named as *secured debts* and afterwards as *investments* in section 330 of the tax law. Section 331 permits the payment of an optional tax, which on June 1, 1917, was a stamp tax at the rate of $2. per $1,000 bond yearly instead of liability to local assessment at about $20 per $1,000. By section 336 it is directed that an investor who does not pay under section 331, shall be assessed (upon October 1 in each year) upon the actual value of the bonds without deduction of debts. The decedent never presented his bonds for such assessment and was not assessed at all upon October 1, 1916, so that the bonds then owned by him and owned at his death were non tax paid under section 336. Section 221-*b* of the tax law, enacted June 2, 1917, in effect July 1, 1917, operates prospectively upon transfers from decedents dying after July 1, 1917, who shall have paid neither tax at the time of their deaths, and imposes an additional transfer tax of 5 per cent. upon the transfer at death of such non tax paid bonds. The tax, being named as an additional tax, is not imposed when there is no transfer tax under section 221-*a*, which will occur when the total estate is less than the exemptions to relatives and charities. But if the estate is above the exemptions, so that there is a tax under section 221-*a*, then the tax of section 221-*b* is imposed without exemptions. The brief of the plaintiffs in error errs in saying that the Court of Appeals reversed its position as to the exemptions in *Matter of Washbourne*, 180 N. Y. Supp. 507 (affirmed 229 N. Y.). The net value of the

bonds, after deducting a proportionate share of debts, expenses and commissions, is deemed to pass to the beneficiaries proportionately, but for convenience is taxed against the executor for their account. The tax on the transfer of unstamped bonds worth $59,284.54 is adjustable as follows:

Gross estate		$435,235.85
Debts, expenses and commissions		22,546.90
Net estate		412,688.95
Value of unstamped bonds		59,284.54
Deduct proportion of debts, etc., .136%		3,066.39
Net of unstamped bonds		56,178.15
Tax at 5%	$2,808.90	

That is to say, in each $1,000 of the total net estate of $412,688.95 passing to the beneficiaries there are $136 of unstamped bonds upon which the tax is $6.80, and the operation of the tax is uniform among the class. The bonds bought, after the closing of the assessment rolls on October 1, 1916, are not taxable; *Matter of Otis,* 103 Misc. 655, aff'd. 229 N. Y.).

The following is a detailed statement as to the New York tax law in question:

Tax Law of the State of New York.

CONSOLIDATED LAWS, CHAPTER 60; Sections 1-340. This law begins with the ordinary taxing system, whereby realty is taxed in the tax district where situated without deduction of debts, and personalty is assessed against the owner in the tax district where he resides and with the deduction of debts. There is no listing law.

Separate Schemes of Specific Taxation.

The bank Stock tax, §§ 24-24*g:* one per cent. without deduction of debts.

A Corporation Tax; §§ 180-207.

A franchise tax; §§ 208-219.

A tax on taxable transfers at decease; §§ 220-245.

The mortgage tax: $5 per $1,000 without deduction of debts, upon debts secured by mortgage on real estate within the state; payable on recording the mortgage;

The Stock transfer tax; §§ 270-280;

THE TAX ON SECURED DEBTS OR INVESTMENTS. ARTICLE XV. This scheme has been in force since 1910; first as the Secured Debt law under chapter 802 of the laws of 1911. The definition of investments in section 330 of the tax law is broader than the definition of secured debts in the same section under the law of 1911, in that the present definition includes all serial obligations whether secured or not. *Exceptions.* Bonds of the United States, of the state of New York and its subdivisions; and New York real estate mortgage bonds taxed under the mortgage tax law.

The permissive tax of section 331. Under the law of 1911 the owner of a secured debt might have the same marked tax exempt by the payment of one-half of one per cent. Under chapter 465 of the laws of 1915 this permissive payment was increased to three-fourths of one per cent. By chapter 261 of the laws of 1916, the exemption was restricted to five years and the permissive tax was made payable by stamps. By chapter 700 of the laws of 1917, section 2, in effect June 1, 1917, the rate of the permissive stamp tax was made twenty cents per $100, for each year not exceeding five. *Excep-*

tions. Section 331, apparently for abundant caution, excludes from the exemption, the operation of the tax on bank shares (§§ 24-24*g*), the franchise tax (§§ 187-9), the transfer at death tax (article X), the stock transfer tax (article XII). *The tax under Section 336.* If the tax of section 331 is not paid, the owner "shall be assessed upon such investment in the taxing district in which he resides, upon the fair market value of such investment, and no deduction for the just debts owing by him shall be allowed". This clause appears in all the above statutes. *Exception of dealers.* Added by chapter 261 of the laws of 1916 and continued by chapter 700 of the laws of 1917.

Tax Law, Article XV, Tax on Investments.

SECTION 330.

Definitions. The word "investments", as used in this article, shall include: Any bond, note, debt, debenture, equipment bond or note, or written or printed obligations, forming part of a series of similar bonds, notes, debts, debentures, written or printed obligations, which by their terms are payable one year or more from their date of issue and which are either secured by a mortgage, pledge, deposit or deed of trust, of real or personal property, or both, or which are not secured at all; excepting bonds of this state or any civil division thereof and such bonds, notes, debts, debentures, written or printed obligations, which are secured by a deed of trust or mortgage recorded in the State of New York on real property situated wholly within the state of New York; excepting also such bonds, notes, debts, debentures, written or printed obligations held as collateral to secure the payment of investments taxable under this article or of bonds taxable under article eleven of this chapter, and

excepting also such proportion of a bond, note, debt, debenture or written or printed obligation, secured by deed of trust or mortgage recorded in the state of New York of property or properties situated partly within and partly without the state of New York as the value of that part of the mortgaged property or properties situated within the state of New York shall bear to the value of the entire mortgaged property or properties.

SECTION 331.

Payment of tax on investments. After this article takes effect, any person may take or send to the office of the comptroller of this state any investment, and may pay to the state a tax at the rate of twenty cents per year on each one hundred dollars or fraction thereof of the face value of such investment for one or more years not exceeding five, under such regulations as the comptroller may prescribe, and the comptroller shall thereupon affix stamps hereinafter provided for to such investment, which stamps shall be duly signed by the comptroller or his duly authorized representative and dated as of the date of the payment of such tax. The comptroller shall keep a record of such investment together with the name and address of the person presenting the same and the date of payment of the tax.

All such investments shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state except as provided in sections twenty-four to twenty-four-*g*, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight and one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter, for the period of years from the payment of such tax for which such tax shall have been paid and such stamps affixed.

SECTION 336.

No deduction of debts against taxable investment. The owner of any investment, on which the tax provided for in this article has not been paid,

shall be assessed upon such investment in the taxing district in which he resides, upon the fair market value of such investment and no deduction for the just debts owing by him shall be allowed against the assessed value of such investment, as provided in section six of this chapter or elsewhere in this chapter or in any other law of this state, except that the deduction from the taxable property permitted by section six of this chapter shall be allowed to any person, in respect of any investment which for the purpose of his business, as hereinafter owned and held for sale by such person then actually engaged in the *bona fide* purchase and sale of such investments as a business, and who then shall have and maintain an office or place of business in this state for the carrying on of the actual *bona fide* business of purchasing and selling such investments as distinguished from the purchase thereof for investment, but such deduction shall not be allowed in respect of investments owned and held for a longer period than eight months.

The Transfer Tax Law.

Section 220. *Taxable Transfers.* A tax shall be and is hereby imposed upon the transfer of property—1, when the transfer is by will or the intestate laws of this state. 3. Whenever the property of a resident decedent, or the property of a non-resident decedent within this state, transferred by will, is not specifically bequeathed or devised, such property shall, for the purpose of this article, be deemed to be transferred proportionately to and divided *pro rata* among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will. 8, The tax imposed shall be upon the clear market value of such property at the rates hereinafter prescribed.

Section 221*a*. *Rate of tax.* 1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father mother, wife or child or in excess of five hundred dollars to any

lineal decedent 1% [tax graduated from 1 to 4%]. 2, Upon all transfers in excess of the value of five hundred dollars or more to a brother, sister, wife or widow of a son, the husband of a daughter of the decedent [Tax graduated from 2 to 5%]; upon all other transfers, [a tax graduated from 5 to 8%].

Section 221*b*. Enacted by Chapter 700 of the Laws of 1917 enacted June 2, 1917 and enacting that section 221*b*, shall take effect July 1, 1917.

Additional tax on investments in certain cases. Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed in addition to the tax imposed by section two hundred and twenty-one-*a*, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; or unless the decedent was actually engaged in the *bona fide* purchase and sale of investments as a business, and at the time of his death had maintained an office or place of business in this state for the carrying on of the actual *bona fide* business of purchasing and selling investments, as distinguished from the purchase thereof for investments purposes and had owned and held such investment for sale for the purpose of his business and not as investment for a period of not more than eight months prior to his death.

Facts Relevant to Article XV.

Investments. The serial investments named in section 330 of the tax law exist because the principal sum is too great to be borrowed at a reasonable rate upon one bond for the whole amount.

The security offered is such that investors are willing to buy them at less than the prevailing rate. It is estimated that there are more than sixty billion of serial bonds listed on the New York Stock Exchange, other than bonds of the United States and bonds of states and of their subdivisions, consisting largely of four and five percent bonds running for a term of years, issued in series convenient to the investor and universally termed investment bonds, and well illustrated by the bonds owned by the decedent. The class of *investments* named in section 330 is an actually existent and definite class marked by peculiarities of its own. *The just taxation of such investment securities* long has been a vexatious problem. They yield a comparatively small rate of interest, but their safety and stability make them attractive to the very wealthy and to the fiduciaries of trust estates. To require that a four percent bond shall be assessed upon the tax roll means that the owner must pay an average annual tax of two percent or more. In selecting this class of bonds *for favorable taxation* at about one tenth of the local rate, the legislature may have been influenced by the fact that it is a severity to insist that such investors shall pay about half of their income as an annual tax, and that public opinion inclines to think that such a tax is too high and does not especially condemn those who escape from it.

The requirement of section 336 that the investors not paying under section 331 shall be assessed upon these bonds without deduction of debts appears as of no import against investors in so far as the deduction of debts is concerned, for they buy these bonds out of their surplus, as in the case of the decedent. And in the absence of a listing statute

and in the administration of the assessment of personal property for taxation in New York, investors have escaped taxation upon such property, although the moderate rate name in section 331 has influenced many since the year 1910 to acquiesce to the scheme of section 331 and to have their bonds marked or stamped. A large and important class of taxpayers have omitted to pay taxes either under section 331 or section 336.

Dealers in investments. Such dealers sell these bonds indifferently to persons within or without the state, and compete with dealers without the state in selling them. Investors without the state will not pay New York tax. In the course of the large sales of such bonds through syndicates since the outbreak of the European War, dealers in investments have been obliged temporarily to take and carry large blocks of such bonds upon borrowed money.

The Classification of Section 221-*b*.

The opinion of the Court of Appeals at page 72 shows that the class consists of property which at the time of death has not theretofore paid any tax, local or state. At folios 123 and 132 is shown the cause which created this class and that the case of the decedent is typical and that prior to the passage of section 221-*b* the estates passing through the surrogate's court bore witness to the inability of the existing tax system to equalize the burden and reach the property. The classification thus created is of a large class of property, with regard to which a transfer tax at death is workable and produces large revenues to the state.

POINT I.

Article XV of the New York Tax Law is valid. The exemption of dealers in investments in Section 336 and carried over into Section 221-*b* is valid. The operation of the tax is equal.

Separate schemes of taxation without deduction of debts are valid, even though compulsory, provided that all in the class are treated alike.

Bells Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232.

Merchants Bank v. *Pennsylvania*, 167 U. S. 461.

Clement National Bank v. *Vermont*, 231 U. S. 120.

Amoskeag Savings Bank v. *Purdy*, 231 U. S. 373, 393.

Such schemes in New York include the Real Estate tax, the Mortgage tax, the National Bank share tax, the Investment tax. The tax under Section 331 of the New York Tax Law, apart from its optional character, is like the tax in *Bell's Gap R. R. Co.* v. *Pennsylvania, supra.*

The tax upheld in *Clement National Bank* v. *Vermont, supra,* was a tax of 7/20 of one per cent. semi-annually on interest bearing deposits in National Banks, without deduction of debts, and with exemptions, including exemption of deposits which did not bear interest exceeding two per cent. per annum.

In *Amoskeag Savings Bank* v. *Purdy, supra,* this Court said by Mr. Justice Pitney, page 393:

> "Nor can we say that the taxation scheme contravenes the limit prescribed by section 5219 Rev. Stat., merely because in individual cases it may result that an owner of shares of

> national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise. * * * The language clearly prohibits discrimination * * * but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual."

Payment under Section 331. Many owners of secured debts or investments paid the optional tax of this Section, but others did not. It was the duty of the latter class to pay a tax upon their personal property.

The additional requirement of Section 336. This section directs that Bonds non tax paid, under Section 331 shall be assessed without deduction of debts. This requirement became useful after the enactment of Section 221-*b*, not because it was observed, but because the records of the assessors show the non-compliance and leave no opportunity to claim that a tax has been paid with regard to such bonds. Apart from this, the added requirement of Section 336 is of no force, unless as against dealers in investments, who are excepted. For investors buy such bonds out of their surplus. If there were any individual cases to the contrary, these cases would fall within the principle announced in *Amoskeag Savings Bank* v. *Purdy, supra.* But it is the case of this decedent which will be considered by this Court, and he could have had no possible objection to the requirement, for he had practically no debts, and had an abundant taxable surplus of other personal property. It is obvious that if a man had $10,000 of bonds and $10,000 of other taxable personalty, and $5,000 of debts, the requirement of Section 336 would mean that the debts should be deducted from the other personal

property. If the decedent had submitted to assessment under Section 336, he could have alleged no injury to himself.

> "A complainant must show that he has personally suffered an injury, the fact that others may suffer is not sufficient. The Court will not speculate whether other persons may suffer."
>
> *Tyler* v. *The Judges*, 179 U. S. 405.
> *Turpin* v. *Lemon*, 187 U. S. 51.
> *Hooker* v. *Burr*, 194 U. S. 415.
> *Hatch* v. *Reardon*, 204 U. S. 152, 160.
> *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534.
> *Collins* v. *Texas*, 223 U. S. 288, 295.
> *Standard Food Co.* v. *Wright*, 225 U. S. 540, 550.
> *Rosenthal* v. *New York*, 226 U. S. 260, 270.

The Exemption Regarding Dealers is Valid.

The opinion of the Court of Appeals, at folio 130, shows the justice of this exemption.

The classification of Section 221*b* is of bonds upon which a personal property tax has not been assessed, or stamps affixed, under Article XV, and inasmuch as Article XV contains the exemption of investment dealers, it was in the nature of surplusage to repeat the exemption in Section 221*b*.

The exemption is so reasonable that it well may be that the Courts would have read such an exemption into the statute, as to securities held transiently within the State for sale and not for investment.

> *Matter of Romaine*, 127 N. Y. 80.
> *Estate of McCahill*, 171 Cal. 482.
> *Herron* v. *Keeran*, 59 Ind. 472.
> *People* v. *Griffith*, 245 Ill., 532.

In accordance with the established rule as to classification:

> "It is not to be upset by thinking up and enumerating other instances as to which it might have been applied equally well, as far as the Court can see."
>
> *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227,

The distinction between a regularly established dealer and one not so established is recognized in *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Tanner* v. *Little,* 240 U. S. 369, 382.

The criticism at folios 61 and 71 of the record, that dealers in real estate might as well have been exempted, fails to consider that such dealers *are* exempted on all real estate without the state owned by them and that this is the real parallel; for bonds secured by mortgage on realty within the state are taxed under the mortgage law and not under Article XV, and realty within the state is taxed *in rem,* leaving the parallel classes of realty within the state and bonds secured by such realty, and if realty without the state could be represented by certificates taxable when within the state and otherwise not, a valid reason for the exemption of dealers would appear.

The right of the legislature to make such exemptions has been repeatedly upheld in this court. In *Cook* v. *Marshall County,* 196 U. S. 261, 273, the exemption was of "jobbers and wholesalers doing an interstate business", and the cases in this court which were thought by the learned Surrogate and the learned Appellate Division to defeat the exemption were expressly distinguished. In *Ozan Lumber Co.* v. *Union County Bank,* 207 U. S. 251, the exemption was of "merchants and dealers who sell patented things in the usual course of business."

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the franchise or continuing privilege of transacting business was taxed, while individuals and partnerships were not taxed with regard to like business. To the like effect are:

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 299.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 561.

Board of Education v. *Illinois*, 203 U. S. 553, 560, 562.

Citizens National Bank v. *Vermont*, 231 U. S. 120, 142.

Farmers Bank v. *Minnesota*, 232 U. S. 516, 531.

Miller v. *Strahl*, 239 U. S. 426, 434.

Northwestern Mutual Life Ins. Co. v. *Wisconsin*, 247 U. S. 132, 140.

The Operation is Equal.

In addition to an erroneous criticism of the law as affected by the exemptions, two other criticisms were made in the Surrogate's Court and in the Appellate Division.

1. That a testator who had evaded the tax in his lifetime might make the law unconstitutional by making an unjust will, discriminating between two beneficiaries equally worthy and giving unstamped bonds to one and a like amount not consisting of such bonds to another, with the result that one pays six times more tax than the other (fol. 79).

In fact, the alleged discrimination of all such examples results from something personal to the testa-

tor, is common to all inheritance tax statutes, and is ordinarily avoided, as in the case at bar, by charging all the taxes upon the residuary estate.

2. Also at folio 72 of the record it is said:

> "There is nothing to prevent the executor or administrator from satisfying the debts and administration expenses out of the securities liable to the additional tax, and thus escape the impost."

But the executor or administrator can do nothing of the sort. The tax being measured by the values at the date of death, the property would be deemed to pass proportionately, even without the express provision of Section 220-3, *supra,* that it shall be thus deemed to pass, where there is a will, and so in intestacy.

Matter of Ramsdill, 190 N. Y. 492.

The policy of the State in giving exemptions to relatives and charities, with the result that in small estates there may be no taxable estate, is not open to objection in this court. The result of any exemption is that cases may be thought up where the law would not work with mathematical nicety as regards transfers just above or below the line, as in the instance given by Mr. Justice McKenna, speaking for this court, in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300:

> "* * * one who is given a legacy of $10,001, by the deduction of the tax receives $99.04 less than one who receives a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

The test is that there is equality of burden between persons in the same situation.

> "Inequalities that result not from hostile discrimination but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."
>
> *Maxwell* v. *Bugbee,* 250 U. S. 525, 543. (Mr. Justice Day.)

POINT II.

This Court will follow the decision of the highest court of New York that Section 221-*b* imposes a transfer tax as an additional tax upon the transfer at death of unstamped bonds which have not paid their just proportion of taxes; that the case of the decedent is typical as regards a definite class of property escaping taxation during the lifetime of the owners although subject to a valid scheme of specific taxation; and that this tax is valid and workable in New York as a transfer tax imposed as a condition precedent to the transfer.

In *Carpenter* v. *Pennsylvania,* 17 How. 456, 562, an inheritance tax case, this court said:

> "This court has no authority to review the act of Pennsylvania upon any ground of justice, policy or consistency to its own Constitution. They are concluded by the decision of the public authorities of the State."

In *Dred Scott* v. *Sandford,* 19 How. 393, 452, it is said:

> "This court has no jurisdiction to review the judgment of a state court upon its own laws."

These two cases, indeed, are prior to various amendments, but the principle of decision is adopted in subsequent cases, as regards facts certified by the highest court of the State, including its statement as to the meaning of its laws and their validity under the Constitution of the State.

Gulf Ry. Co. v. *Texas,* 204 U. S. 403, 411.
Williams v. *Eggleston,* 170 U. S. 304.
Board of Liquidation v. *Louisiana,* 179 U. S. 622, 626.
Gulf & Ship R. R. Co. v. *Hewes,* 183 U. S. 66, 75.
Met. Street Ry. v. *New York,* 199 U. S. 1, 35.
Campbell v. *California,* 200 U. S. 87, 91.
Cahen v. *Brewster,* 203 U. S. 543, 551.
Chanler v. *Kelsey,* 205 U. S. 466, 477, 478.
Moffit v. *Kelly,* 218 U. S. 400, 405.
Preston v. *Chicago,* 226 U. S. 477.
Old Colony Trust Co. v. *Omaha,* 230 U. S. 100, 116.
Willoughby v. *Chicago,* 235 U. S. 45, 50.
St. Louis Land Co. v. *Kansas City,* 241 U. S. 419, 427.
Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157, 165.
Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292, 294.

In upholding the anti-cigarette law of Iowa containing penal provisions and assessing a tax of $300 per annum against the real property, and the owner thereof, whereon cigarettes are sold "in

addition to all other taxes and penalties", this Court said by Mr. Justice Brown:

> "But in the opinion of the Court in the case under consideration, the charge imposed by Section 5,006 is said to be clearly not a license, for it does not grant permission to do an act which act without such permission would be invalid * * * 'It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. That a tax is imposed for the double purpose of regulation and of revenue is no reason for declaring it invalid. * * * Being a tax it was competent for the legislature to prescribe the proceedings and process for its collection.'
>
> This being the latest expression of opinion of the Supreme Court of Iowa we accept it for the purposes of this case. If it be not a construction binding upon us, it is, at least, a construction which we ought to follow, unless we are clearly of opinion that it is wrong. * * * It is not easy to drawn an exact line of demarcation between a tax and a penalty, but in view of the fact that the statute denominates the assessment a 'tax' and provides machinery appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax and not as a penalty."
>
> *Hodge* v. *Muscatine County,* 196 U. S. 276, 279.

In *Grenada Lumber Co.* v. *Mississippi,* 211 U. S. 433, 442, the court said by Mr. Justice Lurton:

> "This constitutes under the interpretation of the Mississippi statute by the Mississsippi court a 'restraint of trade' and a hindrance to competitors in the sale of a commodity.

> Accepting, as we must, this interpretation and application of a state statute by the highest court of the State, there is no question for our consideration other than the insistence that the statute is in conflict with the Fourteenth Amendment."

In *Brown, Forman Co.* v. *Kentucky,* 217 U. S. 563, 572, this court said by Mr. Justice Lurton:

> "Such a construction and interpretation of the statute here involved, by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax."

POINT III.

The class is definite and calls for diversity of taxation.

The class is the class of bonds which have not paid their just proportion of taxes. It is actually and objectively different from the bonds which have paid their just proportion of taxes and are stamped tax paid. The two classes are in functional relation, so that as the undesirable class decreases the desirable class of stamped bonds increases.

From the standpoint of the State, as regards taxation, this difference is the greatest that can be named; for it is the duty of the legislature to legislate in correction of the inequality made manifest by the existence, side by side, of taxed and untaxed property.

State of New York v. *County of Kings,* 125 N. Y. 312, 319.

If the legislature could have found the property, it might have added these bonds to the assessment rolls.

Gallup v. *Schmidt*, 183 U. S. 300.
Jackson Lumber Co. v. *McCrimmon*, 164 Fed. 759.

In the case of the decedent, such a tax would properly have been at the rate of about two per cent. for each of the six omitted years; for having declined the option of section 331, the measure of what should be paid is the tax under section 336.

Or the legislature might have subjected these bonds to an estate tax, similar to the Connecticut estate tax of 10 per cent.—General Statutes of Connecticut, § 1190 (Chapter 243 of the Laws of 1917).

> "All taxable property of any estate upon which no town or city tax has been assessed * * * or paid * * * during the year preceding the death * * * shall be liable to a tax of 2% per annum * * * for the five years next preceding the death." (with provision for proportionate reduction in any year when the tax was paid and exemption of estates under $2,000).

Therefore, it is apparent that the class is definite and that it exists notwithstanding the scheme of separate taxation of article XV of the tax law. In other words, these bonds are a conspicuous example of what the learned Surrogate, at folio 73, characterizes as "the notorious evasion of the payment of personal taxes" and they cry aloud to be classified for taxation in relief of this stigma.

The fact that this tax is named as a transfer tax instead of an estate tax does not make a difference of one penny to this estate, assuming that each tax should be measured according to the just rule of deducting from the bonds their proportionate share

of the debts. In its transfer tax department, the State has adequate machinery to adjust this tax, as a transfer tax, without any difficulty or expense.

The right thus to classify is supported by the converging arguments of Points IV and V, and as preparatory to that argument, and to a discussion of what is "arbitrary", it seems proper to refer to the standpoint of the legislature in making its transfer tax classifications.

A stranger might deem arbitrary the selections from time to time of kinds of property in the New York transfer tax law, when in fact the legislature has proceeded carefully, having regard to its policy under changing conditions. Thus it omitted the realty of residents at a time when it deemed the local taxes too high; it omitted the bank accounts of non-residents, desiring to encourage such deposits; it omitted bonds kept here by non-residents because of the reasons given by the safe deposit companies; it restored the class of stock in domestic corporations owned by non-residents, because of the refusal of certain other states to follow its plan of avoiding double taxation; and so we might proceed through the list and show that all changes, unless the case named in *Beers* v. *Glynn, infra,* were in pursuance of a policy of taxation. And now in pursuance of the decision of this court in *Mager* v. *Grima, infra,* that "it may annex to the grant any conditions which it supposes to be required by its interests or policy", it has annexed to the transfer at death of bonds which have not paid any tax, local or state, this transfer tax as the condition of inheritance. This class of course was not sent from heaven, but exists through the fault or omission of somebody or something. The ignorant may think that it was through the fault of the legislature in not sending its well to do citizens to prison, or in

not enacting a listing law and driving them to New Jersey, but a portion of the cause is in the fact the whereabouts of the class of *investments* taxable under sections 331 and 336 of the tax law is not known until the death of the owners and these owners omit the duty of aiding in the enforcement of the taxing policy of the state, whose tax laws, as stated by this court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562, "furnish the measure of every man's duty in support of the public burdens". Habitually they sit quiet, like the passengers who do not pay unless the conductor asks them; nor is it necessary to qualify their conduct, because their property is qualified by the fact that it has not paid its just proportion of taxes. It is metaphysical to speak of "the basis of the classification" as in something different from the class, as if the basis of "mortgaged property" is not that it is property subject to a mortgage, but is in the improvidence of the owners or in Adam's fall. The opposing argument is apparently that if the legislature discriminates, as in *Beers* v. *Glynn, infra*, and we do not see much sense in the discrimination, the classification is good; but if the legislature has what it supposes to be a good reason, in that all agree that the taxable class is undesirable, and existing in disregard of the just policy of the State, then the classification must fall and the tax is void. In the case at bar, the omission of the citizens and the existence of the class are in the relation of cause and effect, which is not well described as "merely an indirect historical relation". Although the cause be evil the property qualified by the effect of the cause may be taxed, as in *Hodge* v. *Muscatine County*, 196 U. S. 276, 279, quoted in Point II. It is mere language to call such classification and the resulting tax "mongrel", "inherent deformity", "penalty", "inexplic-

able and pointless", "colorable" and the like; a chaos of invective within which the objector would like to see the right of the State to have a policy of taxation disappear. On the other hand, the Court of Appeals was right in pointing out the cause of the class and the condition in which it was in, showing the large class of these bonds in the condition of being non tax paid and further qualified by the fact that this condition is not known until the death of the owner. The legislature might have arrived at the same classification, by classifying bonds owned by resident decedents for taxation at a fixed rate, and exempting from the class bonds which had paid their just proportion of taxes and were stamped tax paid. But the one class is exactly as definite as the other, and the difference in condition is apparent upon the face of the bonds, as stamped and unstamped.

Difference in Condition Calls for Diversity of Taxation.

> "Diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens, or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms, and a system which imposes the same tax upon every species of property, irrespective of its nature, or *condition*, or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens."

Express Co. v. *Seibert*, 142 U. S. 339, 351. (Italics not in the original text.) The reference to the *condition* of the property well applies to the difference in condition between tax paid and non tax paid bonds.

The opposing brief disputes this, but the term *condition* is here used in its first sense, as defined with apt example in the Century Dictionary:

> "*Condition.* I. The particular mode of being of a person or a thing; situation with reference either to internal or to external circumstances; existing state or case; plight; circumstances. (example) Estimate the greatness of the mercy by the *condition* it finds the sinner in—*South*, Sermons."

The resulting inequality of burden between transfers in estates which hold stamped bonds and in estates which hold stamped bonds is no objection to the classification.

In *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461, 463, this Court said:

> "It was well said by Mr. Justice Williams, speaking for the Supreme Court of Pennsylvania, '* * * the argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends on their ability to stand successfully this test, there are none of them that can stand.'
>
> "Indeed the whole argument of a right under the Federal Constitution to challenge a tax law on the ground of the inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237."

> "Equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."
>
> *Magoun* v. *Illinois Trust & Savings Bank*, 170, U. S. 283, 293.

"The very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines, the question of constitutionality."

Atchison, Topeka & S. F. R. R. v. *Matthews*, 174 U. S. 96, 106.

International Harvester Co. v. *Missouri*, 234 U. S. 199, 210.

POINT IV.

Classification of property which has not borne its just proportion of taxes is reasonable in an inheritance tax statute.

This is the classification of the Louisiana inheritance tax, as prescribed in the Constitution of 1898, Articles 235, 236. Article 235 prescribes an inheritance tax:

> "Article 236. The tax provided for in the preceding Article shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance."

The inheritance tax law of Louisiana, as enacted by Act 45 of Louisiana for 1904, contains the same provision, as does also the present Louisiana Statute (Act 109 of 1906 as amended).

The rate of the 1904 statute ran as high as 10 per cent.; the rate of the present statute runs from two to 5 per cent.; if the share of an ascendant or descendant is less than $10,000, it is exempted, but if his share is $10,000 or more, it is taxed without exemption.

It is obvious that, if the criticisms of the New York Statute are valid, the Louisiana Statute is likewise to be condemned.

The Louisiana inheritance tax law of 1904 was before this Court in *Cahen* v. *Brewster,* 203 U. S. 543, and was upheld as valid, although made applicable to the succession of a person who had died before the passage of the law. In a footnote to its opinion this Court quoted the Louisiana law, including the words as in the above Section 236 of the Constitution. It seems that, if the classification had been palpably arbitrary, this Court would have considered this fact, as affecting the retroactive classification.

There are broad principles which establish the right of the legislature to classify the transfer of this property for taxation.

One of these principles is stated in *Plummer* v. *Coler,* 178 U. S. 115, 138, by Mr. Justice Shiras:

> "For, after all, what is an inheritance tax but a debt exacted by the State for protection afforded during the life time of the decedent? It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the State, and such laws seem intended to secure payment from the estate of the citizen when his final account is settled with the State."

The application of this principle calls for a different classification between transfers in estates which have paid their just proportion of taxes and transfers in estates which have not paid their just proportion of taxes. *Classification may be based upon difference of relation to the State.*

Board of Education v. *Illinois,* 203 U. S. 553, 562.

Maxwell v. *Bugbee,* 250 U. S. 525, 542.

If it is objected that the New York law is not as general as the Louisiana law, in that there are other classes of property which escape taxation in New York, it is a sufficient answer that the class of property here selected is a distinct class of property which has escaped taxation under a separate scheme of taxation which the Legislature has deemed necessary to enact.

> "A statute aimed at what is deemed to be an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances as to which it might have been applied equally well, as far as the Court can see."
>
> *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227.
>
> *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 411.
>
> *Lindsly* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81.
>
> *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160.
>
> *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144.
>
> *Pullman Co.* v. *Knott,* 235 U. S. 23.

The State may have a policy of taxation.

In *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 534, it is said by Mr. Justice Holmes:

> "A State may have a policy of taxation. *Quong Wing v. Kirkendall,* 223, U. S. 59, 53. If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to obtain the result by tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder."

This case is in point as to the right of the legislature to classify for taxation, whether the intent is to exact payment for a privilege or is to discourage something that the policy of the State does not favor.

Both the Louisiana and the New York statute are workable statutes, operating upon a large class of transfers and producing large amounts of revenue to the respective States.

If the legislatures of these two States were influenced by the fact that, in addition to its value as producing revenue, the classification is in other respects salutary, the lucid exposition by Mr. Justice Holmes in *Otis* v. *Parker*, 187 U. S. 606, 609-611, of the principles of classification, when avowedly made in respect of what the State deems to be an evil, would be controlling. In that case, where dealings in stocks upon margins were declared to be void under the Constitution of California, it was said:

Page 610.

> "The circumstances afford a reasonable ground for the classification, and thus distinguish the case from *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws."

And to the same effect *Central Lumber Co.* v. *South Dakota*, 226 U. S. 158; where the entire opinion of the court, speaking by Mr. Justice Holmes, is in point here.

It is Not Correct to Refer to this Tax as a Penalty.

The tax cannot be termed a penalty, for the highest court of the state has adjudged that it is a tax imposed upon the large class of transfers which have not paid their just proportion of taxes.

It was the volition of the decedent that caused these bonds to come at his death within the class of bonds which have not paid their just proportion of taxes.

It cannot be said that five per cent. is more than the just proportion of taxes which the decedent should be charged with under Section 336 of the tax law; and his case is typical of the fact that investors thus escaping taxation ordinarily hold their investments for a consideraable period; and the evasion by selling and buying back like bonds would cost $3 per $1,000 in commissions, which is more than the optional tax of Section 331.

Therefore, if the matter were open for consideration, the language of this court speaking by Mr. Justice Pitney in *Missouri, Kansas & Texas RR. Co.* v. *Cade,* 233 U. S. 642, 651, is applicable:

> "But we think it is not correct to consider this statute as imposing a penalty. * * * So far as it goes it imposes only compensatory damages upon a defendant who in the judgment of the legislature unreasonably delays and resists payment of a just demand."

Statutes which give a remedy are classified as remedial, and are given a favorable construction and operation, even though the remedy exceeds

the actual damages, as by double damages or punitive damages.

Hunting v. *Attrill*, 146 U. S. 657, 667-669.
Southern Ry Co. v. *Bush*, 122 Ala. 470, 498.
Southern Ry Co. v. *Decker*, 5 Ga. App. 21, 28.

"In considering a tax, its primary object must be assumed to be the raising of revenue."
In Re Kollock, 165 U. S. 526, 536.

The real objection is that the law is too good and displays human intelligence. If the three Sections 331, 336 and 221*b* are considered as three options, in one of which a tax will be paid, the first two are like the kind words spoken and the tufts of grass thrown by the old man in the fable, but the third is serious.

As to the incidental effect there is no doubt. The brief of the State Comptroller in the Court of Appeals showed that after the enactment of section 221*b* and prior to it being declared unconstitutional, the tax receipts under Article XV began to increase at the rate of several millions per year of increase. Let us then admire the wisdom of the legislator. Certainly not, says the objector, for these people were frightened. There is an air of unreality in this proposed judicial legislation to declare a tax bad because it has a good effect. *Lex plus probatur quando ratione probatur.*

There are two classes of bonds, stamped and unstamped, which have such a functional relation that, as the one increases, the other decreases. A tax enacted for a future date upon the transfer of the undesirable class will bring revenue and will act as a deterrent against the further creation of

that undesirable class, thus tending to cause the desirable class to increase. This reciprocal relation affords a just ground of classification for taxation.

Anything that tends to deter is termed by objectors a penalty, as the high tax of a protective tariff, a prohibitive license tax, a high tax on oleomargarine, and the like. The attempt to call a tax a penalty because of its deterrent effect is to mistake the definite meaning of the terms in the law, but it is not perceived that any ill will to this law, on the part of the court, would arise by extending the term penalty to a tax imposed as a condition prior to the right of succession, operating prospectively and while the property is subject to the disposition of the State and in *custodia legis,* and while only the relation of the decedent and his property to the State is constitutionally involved. It is unnecessary to pursue an inquiry as to what things would be if they were different from what they are. The decision of the Court of Appeals, and the decisions of this court already cited, have established that this is a tax imposed as the condition precedent to the transfer.

POINT V.

The tax is a lawful condition precedent to the granting of the privilege of inheritance.

The Court of Appeals said at page 70 of its opinion:

> "The privilege of making a will is not a natural or inherent right, but one which the State can grant or withhold in its discretion.

> If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create."

It quoted with approval and reliance from like decisions of this court, and at page 72 decided:

> "The tax is then one placed on the transfer of property at the time of death which has not theretofore paid any tax, local or state. The objection cannot be pressed that the beneficiary under the will is punished for the misdeeds of the ancestor in not paying a local or state tax. The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid."

This decision is in accord with a long line of decisions of the Court of Appeals, holding as the principle of these decisions that the transfer tax at death is a condition precedent to the privilege of inheritance. Thus in *Matter of Swift,* 137 N. Y. 77, 83, it is said of the State

> 'It reaches out and appropriates for its use a portion of the property at the moment of the owner's decease, allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law."

cf:

Matter of Delano, 176 N. Y. 486, 491.
Matter of White, 208 N. Y. 64.
Matter of Penfold, 216 N. Y. 163.

This court, in all of its many decisions regarding inheritance taxes of the various states has never held such a tax to be void, and this result has followed from the consistent application and development of the principle stated in *Mager* v. *Grima,* 8 How. 490, 493-4:

> "Now the law in question is nothing more than an exercise of the power which every

> state and sovereignty possesses, of regulating the manner and terms upon which property real and personal within its dominion may be transmitted by last will and testament or by inheritance * * * And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

These words are carefully chosen and the plenary power of the State is admirably described by the words:

> "any conditions which it *supposes* to be required by its interests or *policy*."

The power of the state in annexing a condition to the gift of a privilege approximates the absolute power of Parliament and the strict logic of the matter would trouble an Archimedes to find a *pou sto* before this court, from which to engineer an attack against the State and at the same time to take its gift.

Nevertheless, it is the settled law that the legislature must classify here; and must have some show of reason for saying that the objects selected form a class; and when the existence of the class is conceded, it must also appear that the operation of the law is equal between the members of the class.

In *United States* v. *Perkins,* 163 U. S. 625, 627, this court said in upholding the inheritance tax law of the State of New York:

> "Certainly if it be true that the right of testamentary disposition is purely statutory, the State has the right to require a contribution to the public treasury before the bequest shall take effect. T[illegible] the tax is not a tax upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution

> to the State that it becomes the property of the legatee * * * The act in question is not open to the objection that it is an attempt to tax the property of the United Staes since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, *and it is only upon this that the legislature assents to a bequest of it.*" (Italics ours.)

The conspicuous opinion of this court, speaking by Mr. Justice McKenna in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, is justly relied upon by the Court of Appeals in quoting and in reiterating the principles of this most familiar quotation:

> "The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefor the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

In *Knowlton* v. *Moore,* 178 U. S. 41, this court speaking by the present Chief Justice quoted with approval the foregoing and other cases and said at page 58:

> "An illustration is to be found in *United States* v. *Perkins,* 163 U. S. 625, where the right of the State of New York to levy a tax upon a legacy bequeathed to the Government of the United States was in part rested on the privilege enjoyed by the State of New York to regulate successions."

The subsequent statement in *Knowlton* v. *Moore* of the universal subject of taxation upon which all

inheritance taxes, Federal and State rest—the transmission or receipt and not the right existing to regulate—is not a denial or restriction of the plenary power of the State of New York to regulate the succession by means of a transfer tax imposed as a condition of the succession. This fact is further shown by the succeeding case of *Plummer* v. *Coler*, 178 U. S. 115, again upholding the New York inheritance tax upon this ground and which was approved in *Snyder* v. *Bettman*, 180 U. S. 249, 250, as deciding:

> "that the inheritance tax of the State was in reality a limitation upon the power of the testator to bequeath his property to whom he pleases."

And although in the last named case there was a dissenting opinion, speaking by the present Chief Justice, that opinion stated:

> "the power of the State of New York which was upheld in both the *Perkins* and the *Coler* case, rested not simply on the authority of the State to impose an inheritance tax, but upon the admitted right to regulate the transmission of property by death."

And so in *Campbell* v. *California*, 200 U. S. 87, 95, quoted in the opinion of the Court of Appeals at folio 128, and so in *Maxwell* v. *Bugbee*, 250 U. S. 525, 540.

The brief of the plaintiffs-in-error appears to claim that this is not so, citing the dissenting of Mr. Justice Brewer in the *Magoun* case in support of the fundamental principle that "the innocent transferees" have vested rights, controlling the tax, and are punished for the misdeeds of a third party. This is a necessary position and Necessity knows no law.

The brief of the nevertheless learned and able counsel for the plaintiffs-in-error also speaks of

"the basis of the tax" as if this were a term of art, instead of indicating a number of elements, any one of which may be termed a "basis" if one is so inclined. The basis of the tax of 5 per cent. on transfers of amounts exceeding $200,000 to a sister, in section 221*a* is the whole situation. The right to classify, which includes the right to discriminate and to exempt, is the basis of the classification by amount. The analogy of *tolls*, also stated in point I of the opposing brief, states unworkable situations; for if the property were plainly marked as created in violation of the laws of New York, etc., the State would not let it go across the Brooklyn Bridge or any other bridge. If a parallel situation could be named, the analogy would turn in favor of the right to regulate. Thus, the class of automobiles without tags showing the payment of the license tax is as definite as the class of automobiles marked—license tax paid—by the added tag. If the State had an adequate number of toll gates it might impose a toll on the "transfer" of such automobiles without tags. If after a time such automobiles were taken over such a bridge to New Jersey and if their condition could not be known until they came to the bridge, it would be folly not to regulate the "transfer". The analogy of the police power is a dangerous analogy for the plaintiffs-in-error. Undoubtedly this power may fulfill the double function of regulation and taxation.

Gundling v. *Chicago*, 177 U. S. 183, 190.
Bradley v. *Richmond*, 227 U. S. 477, 480.

In *Tanner* v. *Little*, 240 U. S. 369, 385, speaking of a prohibitive license tax, the court said by Mr. Justice McKenna:

> "Complainants charge that the tax of the statute is not upon the business, but upon its

> incidents. The separation is artificial. It is the incidents which give character to the business, affecting it with evil, it was thought and provoking against it the power of the State."

In *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126, it was said by Mr. Justice Harlan:

> "It may be that the main purpose of the State was to encourage retail dealings in the particular articles mentioned in § 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground."

No authority exists for the proposition that the freedom of the State in dealing with the regulation of a privilege is divided into compartments, but the case of *Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 534, quoted in Point IV upholds the right of the State thus to regulate in taxation.

This freedom emphasizes the right and duty of the legislature to discriminate between the different relations to the State of property which has borne its just proportion of taxes and property which has not. In naming the condition upon which it will assent to the transfer at death of the last named kind, the State should classify with reference to its public policy regarding this undesirable class. Nor should the operation of the statute be described as "unequal and casual" for the case of these bonds is "typical and not exceptional" and all bonds thus owned by resident decedents and qualified as property which has not paid its just proportion are classified and the transfer tax following the classification is neither unequal nor casual, but operates wherever the class exists at death, as does any other transfer tax. As well might the tax on the transfer in non-resident estates of stock in a domestic corporation be described as casual, or the operation of the similar

Louisiana statute during the last score of years. The brief of the plaintiffs-in-error does not attempt to meet the argument, indicated in the opinion of the Court of Appeals, that the long and unchallenged existence of the Louisiana classification, as the basis of a workable statute, affords some show of reason for the classification. Nor does it meet the position that, in conceding that the legislature may classify by kinds of property, it is conceded that the legislature may select for special transfer tax the class of bonds owned by resident decedents, so that their argument should be addressed solely to the contention that the legislature may not exempt the transfer of bonds upon which a tax *in rem* has been assessed and paid. No classification may make more discriminations, may rest upon smaller differences, than in the freedom of a sovereign in classifying the things which it is proposed to give, on condition that the tax is paid. The rule of classification in any tax matter—inheritance tax—license tax—tax-license tax—or otherwise, is that, *in the situation before the court,* there must be some show of reason for the existence of the class, as a class taxable separately, even if we do not agree with the reason. There is no legal mystery here. Things are divided and subdivided into classes by added differences. Taking instances, and following the reasoning in *Tanner* v. *Little,* 240 U. S. 369, 382 *et seq., red* is a very plain difference and justifies a great difference in the tax on red oleomargarine, but

> "distinguish in legislation between red haired men and black haired men and the classification would seem to be wrong; it would have only arbitrary relation to the purpose and province of legislation".

The reason for this is that classification, like justice is not in the clouds, but is in the situation; the rule is the rule of common sense, and as applied to these two cases, there is some show of reason in the first case, even if we do not agree with it, but none in the second. It is conceivable that this highest court might hold that it did not care to review the decision of the highest court of a state that there is a show of reason for the classifications made by the State precedent to the grant of a privilege. The existence of this class of bonds which have not paid their just proportion of taxes is indisputable, and the opposing brief seems to concede that the classification is relevant in any case where the bonds cannot be found to tax; it is difficult to see that the objection is other than that the measure of the tax is wrong.

The careful reasoning of the *Magoun* case is decisive not only of the right of the legislature to classify by kinds of property, which the opposing argument admits, but also that where property is qualified by a relation to the State, this is a ground of classification. The rule stated at page 294 of that case is:

> "Some difference which bears a just and proper relation to the attempted classification —and is not mere arbitrary selection."

It is of interest to consider whether there is any difference between this rule and the rule stated in *Connoly* v. *Union Sewer Pipe Co.*, 184 U S. 540.

> "Some difference which bears a reasonable and proper relation to the act in respect to which the classification is proposed."

Where the statute indicates the ground of community, the classification must follow it. This court has been constrained to hold that the classification of an anti-trust law which exempts farmers

is bad, and that the classification of a like law which exempts laborers is good; for the act in relation to which the classification is proposed is unlawful combination on the part of those having capital of some sort. And when the act in respect to which the classification is proposed is local improvement for the benefit of adjacent property to be assessed therefor,—the taxing district may not be so gerrymandered as to include property entirely, or substantially, out of relation to the local improvement.

Myers Salt Co. v. *Iberia Drainage District,*
239 U. S. 478;
Gast Realty Co. v. *Schneider Granite Co.,*
240 U. S. 55.

But the classifications of the tax law always have a reasonable and just relation to the act in respect to which the classification is made—which is the *imposition of taxes according to classifications "which the State supposes to be required by its interests or policy".* The words "imposition of taxes" seem better to describe the act than the words "raising of revenue" for a tax may be protective, or even made prohibitive of revenue, by reason of its high rate.

Therefore, the only restriction as to tax laws is that there must be some show of reason for the classification, and it is enough to point out some difference in the classification which is not "palpably arbitrary."

Examples of Classification Under Inheritance Tax Laws.

"In *Magoun* v. *Ill. Trust & Savings Bank* * * * the classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified ac-

> cording to amount, and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class."
>
> *Connolly v. Union Sewer & Pipe Co.*, 184 U. S. 540, 561.

Beers v. *Glynn*, 211 U. S. 477, 484, is a conspicuous instance of the legislative power. That classification, whereby personalty owned by a non-resident decedent who also owned realty was classified, and personalty owned by a like decedent was exempted, is claimed by the plaintiffs-in-error to have more show of reason than a classification of bonds exempting bonds which have paid their just proportion of taxes *in rem*, but the opposite view, to say the least, has some argument to support it. That case has repeatedly been cited with approval in this court, as in *Maxwell* v. *Bugbee*, 250 U. S. 525, 541, where the court said by Mr. Justice Day:

> "In making classifications, which has been uniformly held to be within the power of the state, inequalities necessarily arise, for some classes are reached and others omitted, but this has never been held to render such statutes unconstitutional. *Beers* v. *Glynn*, 211 U. S. 477. This principle has been recognized in a series of cases in this court. *Board of Education* v. *Ill.*, 203 U. S. 553. *Campbell* v. *California*, 200 U. S. 87. *Keeney* v. *N. Y.*, 222 U. S. 525."

In *Keeney* v. *New York*, 222 U. S. 525, 535-536, certain conveyances *inter vivos* of remainders were subject to a graduated tax, while others were not, and in upholding the classification it is said:

> "The Fourteenth Amendment does not diminish the taxing power of the state, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value and shall not,

by arbitrary and discriminatory provisions, be denied equal protection."

"It does not deprive the state of the power to select the subjects of taxation. But it does not follow because it can tax any transfer (*Hatch* v. *Reardon*, 204 U. S. 152, 159) that it must tax all transfers, or that it must tax them all alike."

Page 536:

"There can be no arbitrary and unreasonable discrimination. *But where there is a difference it need not be great or conspicuous in order to warrant classification.*" (Italics ours.)

Examples of Classification According to Kind of Property Under the New York Transfer Tax Law of Various Dates.

Resident Estates: From 1892-1903 *realty* was classified for taxation in certain transfers and in others not; *personalty* less than $10,000 was taxable in certain transfers and in others not; if over $10,000 all taxed. *Tangibles* without the state, taxed until 1911, untaxed 1911-1919, 1919 to date, taxed.

Classified for size. Above and below $10,000. Above and below $5,000. Above and below $500. Above and below $100. Below $25,000. $25,001, $75,000. $75,001—$175,000., etc.

Non-resident estates. Realty and not personalty. *Personalty, if accompanied by realty,* and otherwise not. *Bonds* actually within the state (but otherwise not taxed, even though bonds of domestic corporations)—not now taxed. *Bank deposits,* at times taxed, now untaxed. *Stock in domestic corporations,* at times taxed and at other times un-

taxed, now taxed. *Notes kept within the state,* although payable elsewhere, formerly taxed, now untaxed. *Simple contract debts* owed by a resident, formerly taxed, now untaxed. *Capital* of a non-resident invested in business within the state is now taxed, etc. Also property is classified by amounts.

Some of these classifications have been reviewed in this court.

Bank deposits. Blackstone v. *Miller,* 188 U. S. 189.
Personalty where there is realty. Beers v. *Glynn,* 211 U. S. 477.
Transfers of certain kinds inter vivos. Keeney v. *New York,* 222 U. S. 525.
Bonds kept within the State. Wheeler v. *Sohmer,* 233 U. S. 434.
Promissory notes kept within the state, id.
Simple contract debts owed by residents; held taxable in Blackstone v. *Miller, supra.*

(As to the last class of property, it was noted in *Maxwell* v. *Bugbee,* 250 U. S. 525, 543, that these, with some other kinds of property which are assets at the domicil of the debtor for the purpose of founding administration, are not included in the classification of the New Jersey inheritance law applicable to non-residents.)

From the foregoing, it is apparent that the only question is as to the existence of the class, as being different, in some respect, at least open to argument, from the excluded things which are taxed differently. And such is the view of the Court of Appeals.

But the opposing argument in the courts of New York, which has been rejected by the Court of Appeals, took the position that the transfer tax

of Section 221*b* is "a penalty of five per cent. for the misdeeds or omissions of a decedent imposed upon the innocent beneficiaries" (fol. 80). One of the errors that lies at the root of the whole matter lies in the notion that the tax is levied *upon beneficiaries,* innocent or otherwise, and not upon the *transfer* from the benefactor to the beneficiaries, before any right, title or interest of the latter accrues.

In analyzing any transfer tax law we may distinguish classifications by kinds of property and by rate of tax upon various transfers of these kinds of property, as at one per cent, or more than one per cent, etc. The class of untax-paid investments is in the more than one per cent tax class and property passing in amounts above $25,000. is in the more than one per cent class.

The objection raised in the first instance was not as to the kind of property, but as to the rate; first, that it was not uniform because following the exemptions to blood relations, and secondly, that it was uniform, because not varying by blood relationship. And finally the classification was criticised because it was by kind of property, starting from the incorrect premises at the end of folio 78 that "All laws of inheritance look with indifferent eye upon the kind of property transferred" and declaring that the classification violated "the fundamental policy of the law in matters of inheritance whereby the blood of the decedent has always been favored as to taxation and otherwise over collaterals" and that the classification is arbitrary because not made as to heritability, and ending with the sweeping conclusion of the Appellate Division at folios 81-82, that all classifications except that of *Beers* v. *Glynn* have followed heritability and that *Beers* v. *Glynn* is classification by accident.

The position that heritability must qualify the tax on succession; that it is a legitimate inference, from the [incorrect] premise that all laws of inheritance look with indifferent eye upon the kind of property transferred, that the tax must follow this indifference, appears to be varied in the brief of the plaintiffs-in-error in favor of the position that the tax must follow transferability. *Qui agit pingues boves, sibi debet esse pinguis.* Either doctrine would make void, in some respect or another, every transfer tax law ever enacted within the state of New York. It is sufficient to quote the words of Mr. Justice White, speaking for this court, in *Campbell* v. *California,* 200 U. S. 87, 94.

> "All the arguments depend on the proposition that the Fourteenth Amendment has taken away from the states their power to regulate the passage of property by death or the burdens which may be imposed resulting therefrom, because that Amendment confines the state absolutely, both as to the passage of such property and as to the burdens imposed thereon to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this court. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, 562. It is true that in the first of these cited cases it was expressly declared or impliedly recognized, that in the exercise by a state of its undoubted power to regulate the burdens which might be imposed on the passage of property by death a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of the Fourteenth Amendment was to control the states in the exercise of their plenary authority to regulate inheritances and to determine the persons *or objects* upon which an inheritance burden should be imposed." (Italics ours.)

The foregoing is an emphatic affirmation of the plenary right of the legislature to determine the *objects* upon which an inheritance burden should be imposed.

Assuming that there is a valid classification, the remaining questions involve the measure of the tax, a matter not within the purview of the Fourteenth Amendment, as indicated by the dismissal by this court of the writ of error in *Penfold* v. *Travis,* 248 U. S. 537, where the plaintiff in error sought to review the measure of the New York Transfer tax as against him as residuary legatee claiming manifest injustice.

It is enough that these bonds are in the class of unstamped bonds and qualified as property which has not paid its just proportion of taxes. The tax imposed is a tax and is not a penalty. The plaintiffs-in-error omit to consider the force of such cases as *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S., 532, 534, that the State may have a policy in taxation and may use classification for taxation, as a deterrent force.

Criticism of the motives of the State is not sanctioned by this court. The Court of Appeals has decided that this classification "has in it at least an effort for the equalization of taxation and the adjustment of the burdens of government" (fol. 129). But if it were otherwise and if the tax were oppressive, it would be no ground for an appeal to this court.

> *"This court is not the harbor from ill-advised, unequal and oppressive legislation."*
>
> *Mobile* v. *Kimball,* 102 U. S. 691, 704.
>
> *Roach* v. *Nevin,* 128 U. S. 578, 583.
>
> *New York* v. *State Board of Tax Commissioners,* 199 U. S. 37.
>
> *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 329, 330, 331.

"It is no part of the functions of a court to inquire into the reasonableness of the excise, either as respects the amount or the property on which it is imposed."

Patton v. *Brady,* 184 U. S. 608, 623.

McCray v. *United States,* 195 U. S. 27, 58.

Flint v. *Stone Tracy Co.,* 220 U. S. 107, 167.

"No instance is afforded from the foundation of the government where an act which was within a power conferred was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exercise of Constitutional power was unwise or unjust."

McCray v. *United States,* 195 U. S. 27, 54 (Mr. Justice White).

POINT VI.

The tax must be upheld unless the classification is so palpably arbitrary as to exclude the conception of judgment and discretion and to be beyond the pale of governmental authority.

"Nothing in the Fourteenth Amendment imposes any iron clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

St. Louis Southwestern Ry. v. *Arkansas,* 235 U. S. 350, 367 (Mr. Justice Pitney).

Davidson v. *New Orleans,* 96 U. S. 105, 106.

Bell's Gap R. R. v. *Pennsylvania*, 134 U. S. 232, 237.

Pacific Express Co. v. *Seibert*, 142 U. S. 339, 351.

Adams Express Co. v. *Ohio*, 165 U. S. 194, 228.

Merchants Bank v. *Pennsylvania*, 167 U. S. 461, 464.

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 295.

Armour Packing Co. v. *Lacy*, 200 U. S. 226, 235.

Michigan Central R. R. v. *Powers*, 201 U. S. 245, 293.

The classification will not be condemned unless it is "palpably arbitrary".

Murphy Theatre Co. v. *Chicago*, 228 U. S. 61, 70.

Citizens Telephone Co. v. *Fuller*, 229 U. S. 322.

Clement National Bank v. *Vermont*, 231 U. S. 120, 143.

International Harvester Co. v. *Missouri*, 234 U. S. 199, 204, 215.

Definition of "arbitrary"

Arbitrary means that the real class includes more and is broken into without any show of reason, as if the law said—Take the first fifty and call it a day. *Arbitrary* does not qualify as illegal the discrimination of the legislature in selecting subjects of taxation, even in opinions of the state courts naming the discrimination as arbitrary. It is thought that in this court, when an actual difference appears, it will be assumed that the legislature acted

upon grounds of public policy, even though they are not apparent. This is the reasonable position, for the legislator always affirms that the discrimination was based upon good reasons. Thus, the taxing of houses with more than one chimney is always offered as an instance of the power of the legislature to make an arbitrary distinction, but the legislator would say that this amounts to an exemption of the very poor, and would also say that the policy of the State in taxation and the expense of collecting the taxes through the means already at hand determined the selections.

The legislature may tax agreements to sell and not agreements to buy; it may tax sales of oleomargarine at one rate, of colored oleomargarine at a high rate, and not tax dairy butter although all chemists testify that all these are the same thing; and new classes of property hitherto unheard of may be created, as in the classifications by amount in a graded inheritance tax, yet when all persons and property in the same class are treated alike, the tax has uniformly been sustained, both in the state and the federal courts.

It is not the reasoning of a learned court that is required to sustain a classification by the legislature for the purposes of taxation. It is sufficient that the legislature could regard it as proper without doing violence to common sense—something to support an argument, even if the argument is unsound—"some reason for it even if it be a poor one". As stated by Mr. Justice Holmes in *Otis* v. *Parker, supra,* referring to classification based on degrees of evil,

> "No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last

> word upon the subject, and had shown for all time that such laws did more harm than good. * * *"

And speaking of the classification of sales of stock on margin and the declaration that such sales were void,

> "Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion."
>
> *Otis* v. *Parker,* 187 U. S. 606, 609.

Southern R. R. v. *Green,* 216 U. S. 400, distinguished.

This case is often cited to show that any tax is bad, and has excited much discussion, because it is clear that a classification of corporations as foreign and domestic is valid, and the suggestion that that decision involves the principles of estoppel *en pais* as the spider and the fly, is opposed by the fact there is no guaranty that the former will be *semper amabilis* or that the state will not change its tax. A State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the State grants in creating them (*Kansas City R. R. Co.* v. *Stiles,* 242 U. S. 111-118) and in *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147, 156-157, it was held that the State may increase its excise upon the foreign corporation without corresponding change in the tax bearing on domestic corporations, provided the property was such that the investment might be retrieved. As carefully stated by Mr. Justice Van Devanter, speaking for the Court, in the last named case, and as carefully stated by Mr. Justice Day, speaking

for the court in *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 139-140, the permanent character of the investment of the Southern R. R. Co., in Alabama, was a controlling factor. The inevitable permanence of the railroad within the state qualifies the corporation as having the footing of a resident corporation.

Further, it is to be noted that the real class thus existing is divided afterwards, and the tax there condemned would have been valid if applied before the corporation had made its permanent investment; while in the case at bar the class is created by the volition of the decedents in not paying a tax under article XV of the New York tax law in their lifetimes and after notice to them that the tax will be imposed upon the transfer of their estates. The transfers are within a separate class by reason of their relation to the State; while in the Greene case the relation to the State of all railroad corporations resident within the state was identical.

The Court of Appeals said at folio 129:

> "Is there not, at least, a semblance of reason in seeking to tax upon inheritance property which has not been taxed locally or for state purposes, when such fact can only be discovered upon the death of the owner? The matter at least permits of argument, and is not so capricious or whimsical as to be purely arbitrary. It has in it at least an effort for the equalization of taxation and the adjustment of the burdens of government."

And the court gave other reasons, including the classification in Louisiana.

It is difficult to see any show of reason in the claim that the classification of section 221-*b* is without any show of reason.

POINT VII.

The decisions under the Fourteenth Amendment uphold the right of the State thus to classify and tax.

Bell's Gap R.R. Co. v. *Pennsylvania,* 134 U. S. 232, 237.

In *Home Life Insurance Co.* v. *New York,* 134 U. S. 594, 606, it is said:

> "The Amendment does not prohibit the classification of property for taxation,—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate * * * Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it."

Merchant's Bank v. *Pennsylvania,* 167 U. S. 461, 464.

Magoun v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 295.

Orient Insurance Co. v *Daggs,* 172 U. S. 557, 562.

In *Henderson Bridge Co.* v. *Henderson,* 173 U. S. 592, 615, the court said by Mr. Justice Harlan:

> "But in order to bring taxation imposed by a State, or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless the repugnancy to the supreme law of the land is too clear to admit

of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

The Freedom of a Sovereign.

In *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245, 293, 302, the court said by Mr. Justice Brewer:

> "There is no general supervision by the Nation over state taxation, in regard to which the State has, generally speaking, the freedom of a sovereign both as to subjects and methods. * * * A legislature is not bound to impose the same rule upon one class of property that it does upon another. As it may exempt all of one class, so it may impose a different rate of taxation. It is sufficient if all of the same class are subject to the same rate."

The interesting case of *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 75, has a statement of principles by Mr. Justice Van Devanter, stating in compact form principles similar to the foregoing, as applied to cases under the police power.

In *Central Lumber Co.* v. *South Dakota*, the court said by Mr. Justice Holmes:

> "The Fourteenth Amendment does not prohibit legislation special in character, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294.
>
> "It does not prohibit a State from carrying out a policy, that cannot be pronounced purely arbitrary, by taxation or penal law. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62.
>
> "If a class is deemed to present a conspicuous example of what the legislature seeks to pre-

vent, the Fourteenth Amendment permits it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411."

In *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 328-331, the court said, by Mr. Justice McKenna:

"It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation. *There is certainly as great a power.* * * * Granting the power of classification, we must grant Government the right to select the differences upon which the classification is based, and they need not be great or conspicuous. This is the rule; its limitation is that it must not be exercised in clear and hostile discrimination between persons and classes. Thus defined and thus limited it is a vital principle, giving to the Government freedom to meet the exigencies, not binding its action by rigid formulas, but apportioning the burden and permitting it to make those discriminations which the best interests of society require." (Italics ours and references omitted.)

In *Miller* v. *Wilson*, 236 U. S. 373, 382, the court said, by Mr. Justice Hughes:

"The legislature is not debarred from classifying according to general considerations, *and with regard to prevailing conditions*, otherwise there could be no power to classify." (Italics ours.)

In *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 139, the court said, by Mr. Justice Day:

"That the State is not because of the Fourteenth Amendment required to tax all property alike and may classify the subjects required for taxation is too well established to require citation of the many cases in this court in which we have so held. The classification may

not be arbitrary and must rest upon real differences. Subject to these qualities the State has a wide discretion."

In *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157, the court said, by Mr. Justice Pitney:

> "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."

In *Maxwell* v. *Bugbee*, 250 U. S. 525, 539, the court said, by Mr. Justice Day:

> "It is only in instances where the State exceeds its authority, in imposing a tax upon a subject matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void."

In *Green* v. *Frazier*, 252 U. S. Advance Opinions, p. 627, the court said, by Mr. Justice Day:

> "When the constitutional authority of the State undertakes to exercise the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action."

The judgment should be affirmed.

JOHN B. GLEASON,
Attorney and Counsel for
Defendant-in-Error,
223 Broadway,
New York City.

WATSON ET AL., EXECUTORS OF WATSON, *v.* STATE COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

No. 266. Argued October 13, 1920.—Decided November 15, 1920.

In imposing transfer or inheritance taxes, a State may distinguish between property which has borne its fair share of tax burden in the decedent's lifetime and property of the same kind and passing to the same class of transferees, which has not. P. 124.

The additional tax imposed in New York (Cons. Laws, c. 60; Laws 1917, c. 700), on the transfer of certain kinds of securities held by a decedent at his death on which neither the general property tax nor the alternative stamp tax has been paid during a fixed period prior thereto, is based upon a reasonable classification of property and does not violate the equal protection clause of the Fourteenth Amendment. *Id.*

This tax is neither a property tax nor a penalty. P. 125.

226 N. Y. 384, affirmed.

THE case is stated in the opinion.

Mr. Harold W. Bissell, with whom *Mr. Wm. C. Cannon* and *Mr. Edward R. Greene* were on the brief, for plaintiffs in error.

Mr. John B. Gleason for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The New York Tax Law (Consolidated Laws, c. 60) provides (Article 1, § 9) that personal property shall be assessed and taxed to the owner at the place where he resides, but exempts (Article 15) from such taxation certain bonds and other obligations, called in the act investments, on which there has been paid an optional tax at a lower rate, which payment is evidenced by a stamp affixed. The Tax Law also provides (Article 10) for an inheritance or transfer tax which varies, among other things, according to the relationship of the beneficiary to the decedent. By § 221-b, Laws of 1917, c. 700, § 2, an additional tax equal to 5 per cent. of the appraised value of the investment is imposed on the transfer of investments held by the decedent at his death on which neither the general property tax nor the stamp tax above described has been paid during a fixed period prior thereto, provided that the estate is larger than the exemptions to relatives and charities.

Watson, a resident of New York City, held, at his death in 1917, certain bonds on which neither the general property tax nor the stamp tax had been paid. The transfer tax appraiser, appointed by the Surrogate's Court, reported that there was payable by the executors in respect to those bonds the additional transfer tax prescribed by the Act of 1917. The Surrogate disallowed the tax on the ground that the statute violated the state constitution; and his decision was affirmed by the Appel-

late Division of the Supreme Court, 186 App. Div. 48. The Court of Appeals of New York held that the act violated neither the state nor the Federal Constitution, 226 N. Y. 384; and the case comes here on writ of error. The contention is that the tax imposed denies to Watson's estate equal protection of the laws.

The occasion and the purpose of the statute are shown by the Court of Appeals. An owner of investments is not required either to list them for assessment locally under the general property tax law or to present them for stamping under the investment tax law. Whether the investments of a resident are taxed during his life depends either upon his own will or upon the vigilance and discretion of the local assessors. This condition led to loss of revenue by the State and to inequality in taxation among its citizens. To remedy both evils this additional transfer tax was imposed upon investments of a decedent which had wholly escaped taxation. It is insisted that the tax is discriminatory because under it other property of the same kind bequeathed to persons standing in the same relationship to the decedent will not be taxed. But the power to classify for purposes of taxation is fully established. The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee, for instance as engaged in charity. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 300; *Billings* v. *Illinois*, 188 U. S. 97; *Campbell* v. *California*, 200 U. S. 87. But their list does not exhaust the possibilities of legal classification. See *Beers* v. *Glynn*, 211 U. S. 477, 484; *Keeney* v. *New York*, 222 U. S. 525; *Maxwell* v. *Bugbee*, 250 U. S. 525. Compare *Hatch* v. *Reardon*, 204 U. S. 152. Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It

is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified,—here the right to receive property by devolution. It is enough, for instance, if the classification is reasonably founded in "the purposes and policy of taxation." *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 354; *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Clement National Bank* v. *Vermont*, 231 U. S. 120, 136–137; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 529–530. And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not? [1]

It does not follow, as is also argued, that the act in question imposes a property tax, merely because its existence may induce owners of investments to present them for taxation under the Investment Tax Law. Nor is it to be deemed a law imposing a penalty merely because the decedent's estate may under it be required to pay more in taxes than the deceased would have paid if he had presented his property for taxation under the Investment Tax Law. Whether this additional transfer tax would be obnoxious to the Fourteenth Amendment if it could be deemed a property tax or a penalty, we have no occasion to consider.

The judgment of the Surrogate's Court entered on the remittitur from the Court of Appeals of New York is

Affirmed.

---

[1] Connecticut (Gen. Stats. 1918, § 1190) and Louisiana (Constitution, 1898, Arts. 235, 236; Act 45 of 1904) also impose a special inheritance tax on the transfer of property which has not borne its share of taxation during a period prior to the owner's death. The latter statute has been frequently before the courts, *Succession of Mathias Levy*, 115 La. 377, 385; aff'd *Cahen* v. *Brewster*, 203 U. S. 543; *Succession of Pritchard*, 118 La. 883; *Succession of Westfeldt*, 122 La. 836.